Petition

81-1967

No.

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IN THE

Supreme Court of the United States

October Term, 1981

THOMAS CANNON, ROBERT STILLWELL, DONALD R. BREWER and DAVID L. PETERSON, on Behalf of Themselves and all Other Similarly Situated "Firemen" and "Train Service Employees" Affected by the Northeast Rail Service Act of 1981,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION and UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Special Court, Regional Rail Reorganization Act of 1973

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Questions Presented.

1. Whether Congress violated the Fifth Amendment's due process clause and the prohibition against the taking of private property for public use without just compensation when, in order to ensure the profitability of a single private for-profit corporation, it enacted legislation, specifically applicable only to that corporation, mandating and authorizing it to breach previously negotiated and legally binding collective bargaining agreements with its employees.

   (a) Whether Congress could require and authorize the corporation to fire 4600 employees whose jobs were protected by the agreements and limit the amount of severance allowance to any employee to $25,000 regardless of the number of years of future service and earnings an employee could otherwise reasonably expect.

   (b) Whether Congress could require and authorize the corporation not to fill an equivalent number of job positions vacated by the severed employees, despite provisions to the contrary in said collective bargaining agreements.

2. Whether because the U.S. Government holds part of a corporation's stock, Congress can, without violating the Fifth Amendment, authorize the corporation to breach agreements that resulted from collective bargaining which Congress had specifically mandated.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

THOMAS CANNON, ROBERT STILLWELL, DONALD R. BREWER and DAVID L. PETERSON, on Behalf of Themselves and all other Similarly Situated "Firemen" and "Train Service Employees" Affected by the Northeast Rail Service Act of 1981,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION and UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari.

The Petitioners, Thomas Cannon, Robert Stillwell, Donald R. Brewer, David L. Peterson, on behalf of themselves and other similarly situated "firemen" and "train service employees" affected by the Northeast Rail Service Act of 1981, respectfully request that a writ of certiorari issue to review the decision dated March 31, 1982 and the judgment of the Special Court, Regional Rail Reorganization Act of 1973 (hereinafter the "Special Court"), entered pursuant thereto in this proceeding on April 7, 1982.

Opinion Below.

The opinion of the Special Court, dated March 31, 1982 is unreported and appears in the Appendix hereto at A1 *et seq.*

Jurisdiction.

The Special Court possessed exclusive original jurisdiction over this matter pursuant to section 1152 (a) of the Northeast Rail Service Act of 1981 (Pub. L. No. 97-35, 95 Stat. 357, August 13, 1981). Pursuant to subdivision (b) of that same section, a judgment of the Special Court is reviewable by this court upon a petition for a writ of certiorari. Such review is exclusive (*id.*).

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

45 U.S.C. §741(b) provides in pertinent part:

> The (Consolidated Rail) Corporation shall be a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government . . .

45 U.S.C. §774(d) provides as follows:

> *New collective-bargaining agreement.* Not later than 60 days after the effective date of any conveyance pursuant to the provisions of this Act, the

> representatives of the various classes of crafts of the employees of a railroad in reorganization involved in a conveyance and representatives of the [Consolidated Rail] Corporation shall commence negotiation of a new single collective-bargaining agreement for each class and craft of employees covering the rate of pay, rules, and working conditions of employees who are employees of the Corporation. Such collective-bargaining agreement shall include appropriate provisions concerning rates of pay, rules, and working conditions, but shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those established herein. Negotiations with respect to such single collective-bargaining agreement, and any successor thereto, shall be conducted system-wide.

Section 702 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701 *et seq.*), as amended by the Northeast Rail Service Act of 1981 (Pub. L. No., 97-35, §1143(a)) is set forth in footnote 1 of the opinion of the court below and appears in the Appendix at A28.

Statement of the Case.

Petitioners and the class they represent are employees of Respondent Consolidated Rail Corporation (hereinafter "Defendant" or "Conrail") a private for-profit corporation originally established by Congress pursuant to the Regional Rail Reorganization Act of 1973 (45 U.S.C. §701 *et seq.*, hereinafter "RRRA"). Conrail is the successor to several former bankrupt railroads which, prior to their demise, had operated primarily in the northeastern and midwestern part of the United States.

Although Congress provided federal subsidies to assist Conrail get started, the legislation which established Conrail specifically provided that it was to be a private corporation and ". . . not an agency or instrumentality of the federal government." 45 U.S.C. §741(b).*

Simultaneously with its creation, Conrail was directed by Congress to enter into collective bargaining with its employees, many of whom were former employees of Conrail's legal predecessors. 45 U.S.C. §774(d). Among the agreements entered into as a result of said collective bargaining were the so-called "Manning Agreement"**, as amended, governing "firemen" (also known as "engine service employees"), and the so-called "Crew Consist" Agreement,*** as amended, governing "train service employees" (also known as "trainmen," including brakemen and conductors).

The effect of these agreements was to require Defendant, under specified circumstances and based on certain formulae, to make available a minimum number of jobs on operating trains or engines or in railroad yards, which

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*Despite its "private" status, however, the United States is presently by far the largest (over 90%) single stockholder of Conrail. Transcript of proceedings below at 41.

**The Manning Agreement is not peculiar to Conrail; it is, in fact, in force on every major railroad in this country as a result of the July 19, 1972 agreement between the United Transportation Union and the National Carriers' Conference Committee representing the railroads, including, for example, the Delaware & Hudson Railway Company and the Central Vermont Railway, Inc., both of which operate in the same geographical area as Conrail.

***The Crew-Consist Agreement, while not as universally applicable as the Manning Agreement, is also common (with inconsequential variations) to many railroads and, in fact, many railroads operate pursuant to agreements requiring minimum crews larger than the ones called for under Conrail's Crew-Consist Agreement. This is true of railroads specifically operating in the same geographical area as Conrail.

jobs generally were awarded on the basis of seniority rights within various operating seniority districts of Conrail.

The negotiations mandated by Congress pursuant to 45 U.S.C. §774(d) also ultimately resulted in wage concessions and deferrals by these employees of over $200 million.

By 1981, Congress had become concerned about the profitability of Conrail and, in order to bolster its financial posture, enacted the Northeast Rail Service Act of 1981 (Pub. L. No. 97-35, §§1131 *et seq.*), effective August 13, 1981. The Defendant admits that the Manning and Crew-Consist agreements were already in effect when the Act became law.* Under that law, §702** was added to the RRRA requiring and permitting Conrail, notwithstanding said agreements, to "terminate the employment of certain employees," specifically firemen and trainmen, provided however, that such employees were to receive a severance allowance not in excess of $25,000 (paid for out of a fund established by Congress). The purpose of §702 was to enable Conrail to enhance its profits by cutting its labor costs. Pub. L. No. 97-35, §§1132(4) and 1133.

The $25,000 ceiling was imposed regardless of the number of years of future service and earnings an employee could otherwise have reasonably expected, and regardless of the overtime hours and other conditions that substantially affect the take-home pay of employees. In many cases, the $25,000 does not even approach the amount of compensation an employee could otherwise expect. There is, therefore, no correlation between the ceiling and the amount an employee would have earned but for the severance.

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*Paragraph "24" of Complaint and Defendant Conrail's Answer.

**Section 702 is set forth in full at A28 *et seq.*

The number of employees to be severed under §702(b) was to be determined unilaterally by Conrail. Employees could volunteer for severance and accept the allowance, but if an insufficient number of employees volunteered, Conrail itself could sever involuntarily a sufficient further number as it wished.

Involuntary severances authorized by the legislation permit Defendant Conrail to fire men who by virtue of their seniority would be entitled to work under the aforementioned agreements and, who, but for such terminations, would continue to exercise their contractual rights to their jobs.

In addition to the employees actually severed, §702(e) (1) required Defendant Conrail, in the case of firemen, to refrain from filling ("blank") a number of positions equivalent to the number of firemen severed pursuant to §702(a). Section 702(e) (2) also authorized Conrail to blank as many brakemen positions as there were brakemen severed under §702(a).

The blanking of positions authorized under §702(e) permits Defendant to refuse to make available to firemen and trainmen positions which it otherwise would have been required to make available under the terms of the aforesaid Manning and Crew-Consist Agreements.*

Defendant has not acknowledged nor does the Northeast Rail Service Act provide that the extent of termina-

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*Petitioners and Conrail have stipulated that but for §702, the disputed terminations and blankings could not have occurred under the Manning and Crew-Consist Agreements. This is also consistent with the decision of the Court below.

tions and blankings it authorizes is circumscribed by the Manning and Crew-Consist Agreements.*

Conrail has moved swiftly to implement the terminations and blankings authorized by §702. When completed, there will be 4600 terminations and an equal number of blankings.**

Petitioners and the class they represent consist of firemen and train service employees who are subject to the terms of the Manning and Crew-Consist Agreements. They initiated this action in the Special Court (Regional Rail Reorganization Act of 1973) pursuant to Pub. L. No. 97-35, §1152(a) (1) demanding declaratory and permanent injunctive relief and backpay on the grounds that the job terminations and blankings authorized by §702 are an unconstitutional taking of their contractual rights. They also contend that a procedural due process deprivation occurs by virtue of the failure to provide any procedures to ensure adequate compensation in individual cases. Many of their number are presently unemployed or working in less

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*The enactment of §702 would otherwise have been unnecessary since, in the absence of contractual or statutory restriction, Conrail could presumably have undertaken the severances and blankings at any time. See Opinion below in *United Transportation Union v. Consolidated Rail Corporation* (Civil Action No. 82-4), *infra* at A-10.

**Conrail determined that it would initially sever 3,633 employees, consisting of 1,303 firemen and 2,321 trainmen. On December 7, it terminated 600 employees and blanked an equivalent number of positions. On January 7, 1982, Conrail terminated an additional 1,660 employees at various locations throughout its system. As of March 10, 1982, there remained 2,340 employees to terminate and an equivalent number of positions to blank, which Conrail admits it has every intention of doing.

desirable jobs for Conrail* than they otherwise would be but for Conrail's actions undertaken pursuant to §702. The vast majority of these employees are the principal wage-earners of working class families, who will be and are being devastated by the actions of the Defendant Conrail. Many are in danger of losing their homes and are facing other serious and irreparable injuries resulting from the loss of jobs.

After this action was commenced, the United States intervened as a Defendant pursuant to 28 U.S.C. §2403(a) on the grounds that the constitutionality of a federal statute had been called into question.

Since there were no questions of material fact, Petitioners moved for Summary Judgment. On March 31, 1982, the Court below issued its decision** rejecting Petitioners' constitutional claims and on April 7, 1982, entered Judgment pursuant thereto.*** This Petition for Certiorari ensued.

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*When a position is blanked, a person previously on that job can move down to a lower or less desirable position occupied by a junior employee who must then vacate said position. This process is called "bumping." The bumped employee then may, in turn, bump other employees in still lower positions. As the bumping process runs its course, ultimately those employees occupying the least desirable positions lose their jobs altogether. There can be no doubt that the number of positions blanked means that at least that number of people will lose their jobs. Because the job positions operate on Saturdays and Sundays also, it probably means that more men will lose jobs than the actual number of positions blanked.

**Appendix A. That decision below was a unified opinion disposing of other cases argued simultaneously with Petitioners'. Specifically Part 3 of the Opinion below, entitled "Constitutionality: Due Process and Equal Protection," deals with the present case.

***Appendix B.

REASONS FOR GRANTING THE PETITION.

POINT I.

This case presents exceptional and important questions affecting national labor policy, the reliability of collective bargaining agreements (as well as other contracts), and the power of Congress under the commerce clause to set them aside without compensation.

This case is one of first impression. It involves an unusual collision between the competing interests of the power of Congress under the Commerce Clause, on the one hand, and individual rights protected by the Fifth Amendment's Due Process Clause and the prohibitions against the taking of private property (contractual rights) without just compensation, on the other. Never before has Congress attempted nor has this Court sanctioned usage of the Commerce Clause to enact legislation abrogating the terms of a single contract between private parties for the admitted purpose of ensuring the profitability of one of the parties without compensating the other. Also unprecedented is the uncompensated legislative extinguishment of contractual rights which arose as a result of collective bargaining which Congress itself had specifically and previously directed the parties to enter into. 45 U.S.C. §774(d).

The challenged legislation is not the type which, as a means of achieving a broad social or economic purpose, may have incidentally impaired or negated contractual rights that arose under various contracts. *Philadelphia, Baltimore and Washington R.R. v. Schubert,* 224 U.S. 603 (1912). On the contrary, it is instead *ad hoc,* abrogating a single contract between two private parties involving one employer and one union. Since it does not affect the public

in general, but penalizes only a single party, it is most certainly constitutionally suspect. *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 250 (1978). *United States v. Willow River Power Co.,* 324 U.S. 499, 502 (1945). The legislation leaves untouched identical or nearly identical collective bargaining agreements between other employers and employees in the same industry in the same region of the country.

This case has catastrophic national implications for the entire collective bargaining process, which has been the underpinning of industrial-labor peace in this nation since passage of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, in 1926 and the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.*, in 1932. This court has consistently recognized that collective bargaining lies ". . . at the core of our national labor policy . . ." *American Tobacco Company v. Patterson,* _____ U.S. _____, 50 U.S. Law Week 4364, 4368 (April 5, 1982); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977). Nevertheless, the lower court's decision stands for the proposition that if a private corporation engaged in interstate commerce has struck an unfavorable deal with its employees at the bargaining table, it can always be bailed out by legislation unilaterally annihilating the contractual rights of employees without compensating them. If this is so, why should labor ever agree in the future to sit down at the bargaining table and agree to terms? For example, in the present case, the employees of Conrail, in order to obtain the job security protections which the legislation and the lower court decision have now taken away, made other substantial concessions at the bargaining table. They thought, however, they were getting something (job security) in return. Now they are losing that also. By permitting the blanking of positions, the decision below robs them of the opportunity to exercise their seniority rights which this Court has only recently held to be of "overriding importance." *American*

Tobacco Co. v. Patterson, supra at 4368; *Humphrey v. Moore,* 375 U.S. 335, 346 (1964).

The decision below, if allowed to stand, eliminates the certainty that collective bargaining agreements will not be disturbed by outside parties. Henceforth, there will be no incentive left for either party to concede anything at the bargaining table. The *sine qua non* of collective bargaining has always been concession; now, however, the mutuality of collective bargaining has been destroyed. This case is an invitation to national labor strife.

During the past few months much national publicity has attended the negotiations between the United Auto Workers and this country's two major domestic automobile manufacturers. Both Ford Motor Co. and General Motors employees have recently conceded or given back substantial wage increases in return for job security in order to help their employers out of their current economic doldrums.* Now that these collective bargaining agreements are in place, will Congress be able to decide, if the profits of either company are, in its mind, insufficient, that the hard-won contractual rights of workers must be sacrificed for the general good (equated with the profitability of Ford or GM)? The lower court's opinion in the case at bar says so. The decision below could justify setting aside collective bargaining agreements in other industries which are equally vital to the economy—aerospace, chemical, steel, aviation, etc. How far does the principle of the case extend? Can Congress legislate that auto workers at Chrysler must now work for half their previously negotiated wage rate?

It is not just the rights of workers that are threatened. It is the right of all contracting parties. The principle could

*N.Y. Times, April 10, 1982 at A1.

operate just as perversely and unfairly against management. Hereafter, Congress might decide that a collective bargaining agreement affecting employees of a single company engaged in interstate commerce is so adverse to labor as to be against a perceived national interest. That single contract could also be subject to *ad hoc* legislative revision severely prejudicing the employer's rights. Collective bargaining agreements would thenceforth be worth no more than the paper upon which they were written. They would be subject to the whim and political idiosyncracies of each succeeding Congress. This is clearly inconsistent with the strong federal labor policy, as recognized by this Court, against interference with the terms of collective bargaining agreements. *Chicago & Northwestern Railroad Co. v. United Transportation Union,* 402 U.S. 570, 579 n. 11 (1971). *Norfolk and Western Railway Co. v. Nemitz,* 404 U.S. 37 (1971), reh. den. 404 U.S. 1026 (1972).

Moreover, assuming *arguendo* that the profitability* of Conrail serves an important national purpose, this does not eliminate Fifth Amendment considerations. Even in wartime, Government's taking of private contractual rights to meet a national emergency has required compensation under the Fifth Amendment. *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

The decision below also means that even where Congress itself mandates, as here, that parties enter into collective bargaining, 45 U.S.C. §774(d), they will be unable to rely on the agreements reached. Such a holding contradicts

*L. Stanley Crane, Conrail's chairman of the Board, announced that Conrail earned a profit of $13.8 million in the second quarter of 1981, and $34.9 million in the third quarter, even before the effective date of the blankings and terminations authorized by §702. NY *Times*, December 4, 1981 at D1. Crane is reported as saying that Conrail was ready to turn a profit in any case in 1981 despite the "awful year for the economy" *Business Week*, April 5, 1982 at 72. See also, *The Conrail Inside Track*, Vol. 4, No. 1 (publication of Consolidated Rail Corporation, 1982).

this Court's recent decisions to the effect that the Constitution prohibits legislation directly and adversely affecting the economic backed expectations of an individual's private property rights. *New York Trust Co. v. New Jersey,* 431 U.S. 1 (1977); cf. *Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 125 (1978). In the former case, this Court held that certain security pledged to protect investors in a State's bond obligations could not be retroactively rescinded by legislation after the investment was made. The Petitioners in the present case made concessions as an investment to protect their jobs. Their job security, however, apparently can be rescinded retroactively. Are these workmen somehow to be treated differently from wealthy bondholders?

Moreover, this Court has been hostile to Government's repudiation of its own obligations. *New York Trust Co. v. New Jersey, supra; Lynch v. United States,* 292 U.S. 571, 579 (1934); and *Perry v. United States,* 294 U.S. 338, 348, 350-51 (1935). Yet here, Congress set up Conrail and the United States holds much of its stock.* Congress ordered Conrail to enter into the collective bargaining which resulted in the agreements it now seeks to abrogate. 45 U.S.C. §774(d).

Finally, the importance of this case is demonstrated by the very fact that Congress itself saw fit to take such an unprecedented step in order to assist a single corporation. That alone manifests the importance which Congress puts on the profitability of Conrail. Whether it can legally do so in such fashion will be a guide for Congress in the future if, for example, Chrysler or any other major corporation should be deemed insufficiently profitable and Congress decides it is in the national interest to bolster it

*Although Conrail is supposedly private, 45 U.S.C. §741, the Government, in fact, holds well over 90% of its stock. Transcript of proceedings below at 41.

by similar means. A denial of certiorari here may well convince Congress that such future actions will not invite this Court's scrutiny.

POINT II.

The lower court's decision was erroneous.

The essence of the lower court's opinion dealing with this particular case* was that although contract rights are "property" protected by the Fifth Amendment (*Lynch v. United States*, 292 U.S. 571, 579 [1934]), a contract between private parties cannot stand in the way of Congress acting in the national interest under the Commerce Clause. This, however, was an over-simplification and missed the point. It is certainly true that this Court has frequently held that statutes designed to achieve a broad national social or economic goal are no less valid because they may incidentally impair or negate existing private contractual rights. *United States v. Darby,* 312 U.S. 100 (1941); *Louisville & N.R.R. Co. v. Mottley,* 219 U.S. 467, 482, (19[illegible]). Petitioners even concede that in appropriate circumstances Congress has the power under the Commerce Clause to regulate the size of train crews. *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.,* 382 U.S. 423 (1965). In both those cases, and in all the other cases cited by the lower court in support of the power to set aside contracts, however, Congress was not aiming at a single contract between two private parties, leaving untouched all other identical or nearly identical contracts between other parties similarly situated. The laws under scrutiny in those cases were ones of general and uniform application which incidentally impaired contracts between various parties. Here, however, Congress makes no pretense about general application.

*Appendix A, Part 3, "Constitutionality; Equal Protection and Due Process," *infra* at A13, *et seq.*

Not everyone with similar contract rights is affected; indeed only the Conrail employee suffers; his neighbor across the street working for the Delaware & Hudson Railway under a contract providing identical job security continues to enjoy his rights.

Indeed, in other contexts this Court has held unconstitutional legislation that attempted to single out only a few contracts without achieving or effecting an overall social or economic purpose. *Allied Structural Steel v. Spannaus,* 438 U.S. 234 (1978).

The lower court in the present case also stated erroneously that the employees had no "settled expectations" that Congress would refrain from doing away with their jobs. This is inaccurate. At the time Conrail was formed, Congress had specifically directed Conrail and its employees to enter into negotiations resulting in the agreements which the legislation challenged herein now sets aside. 45 U.S.C. §774(d). These agreements had the force of law in back of them and the economic rights accruing to the employees thereunder could not thereafter be invaded without compensation. *United States v. Willow River Power Co.,* 324 U.S. 499, 502 (1945). Given this nation's long history of supporting and this Court's reluctance to interfere with collective bargaining, especially in the context of railroads, it can hardly be said that the employees could have expected that Congress would thereafter attempt to annul an agreement arising out of the very negotiations Congress had itself ordered the parties to engage in. *Norfolk and Western Railway Company v. Nemitz,* 404 U.S. 37 (1971), reh. den. 404 U.S. 1026 (1972). *Chicago & Northwestern Railroad Co. v. United States Transportation Union,* 402 U.S. 570, 579 n. 11 (1971).

The court below apparently held that since not all men necessarily lost their jobs or were not terminated,* their property was not taken. It relied on a dubious analogy to those cases where the property in question was tangible rather than intangible (contract right) and the physical property retained some use to the original owner even after the legislation challenged became effective. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). Such analysis ignores the fact that the least senior men in the present class action lose their jobs completely. Moreover, even as to those lucky enough to keep less valuable jobs, they will earn substantially less than before, and the specific jobs to which they were previously entitled have been totally eliminated. In those cases where there has been a complete taking of physical property, this court has never held that such a taking was permissible without compensation if, in return, the exercisor of eminent domain gave the former property owner an admittedly less valuable piece of property. Compensation must be the full and perfect equivalent of the property taken. *United States v. Miller,* 317 U.S. 369 (1943), reh. den. 318 U.S. 798; *Monongehela Navigation Co. v. United States,* 148 U.S. 312 (1893).

Finally, the court below seemed to justify the legislation on the grounds it was in the national interest to see Conrail profitable, which outweighed the Petitioners' expectations as to job security. The mere fact, however, that some action may be in the national interest does not nullify the prohibitions against the taking of private property without just compensation. Otherwise, the Fifth Amendment would make no sense. Moreover, the lower court did not deal at all with the problems posed by the Government's own selfish motives in this case. The fact is that although

*Some senior employees could opt to be furloughed without compensation in lieu of termination and they could bump another junior employee. These men could receive no severance allowance.

Conrail is supposed to be a private corporation, the United States owns most of the stock.* Does the fact that the Government has invested heavily in Conrail and holds its stock give it *carte blanche* to repudiate that corporation's obligations? This Court has always viewed unfavorably any attempt by Government to repudiate legislatively its own obligations. *New York Trust Co. v. New Jersey,* 431 U.S. 1 (1977); *Lynch v. United States,* 292 U.S. 571 (1934); and *Perry v. United States,* 294 U.S. 300 (1935).

The simple fact is that if Conrail is so vital to the national interest, then Congress should act forthrightly, nationalize it, and compensate those whose vested contract rights are impaired as a result. *United States v. General Motors Corp.,* 323 U.S. 373 (1945). The admitted purpose of this legislation, however, is to make Conrail "profitable" so that the United States can sell the shares of Conrail stock it owns to the public.** In order to do so, it is seeking to have the corporation repudiate its own obligations to its employees. Viewed in this light, and stripped of its veneer, the legislation challenged herein is nothing more than a blatent attempt by the Government to circumvent its constitutional obligations under the Fifth Amendment to pay for private property rights when it takes them in order to achieve another governmental purpose. The decision below upholding that legislation sets an extremely dangerous precedent, undermining the security of contracts and individual citizens' protections against the taking of private property for public use without just compensation; it simply should not be allowed to stand.

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*The lower court acknowledged during oral argument that it was aware of the fact that well over 90% of the stock of Conrail was, in fact, owned by the Government. Transcript at 41.

**USRA, Conrail at the Crossroads: The Future of Rail Service in the Northeast, at 51 (April, 1981).

Conclusion.

A writ of certiorari should issue to review the opinion and judgment of the Special Court, Regional Rail Reorganization Act of 1973.

Respectfully submitted,

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Appendix

APPENDIX A.

Opinion of Friendly, P.J.

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

UNITED TRANSPORTATION UNION,

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant,

Civil Action No. 82-4

and

CONSOLIDATED RAIL CORPORATION,

Plaintiff,

v.

UNITED TRANSPORTATION UNION, *et al.*,

Defendants.

Civil Action No. 82-7

THOMAS CANNON, ROBERT STILLWELL, DONALD R. BREWER, and DAVID L. PETERSON, On Behalf of Themselves and all Other Similarly Situated "Firemen" and "Train Service Employees" Affected by the Northeast Rail Service Act of 1981,

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Civil Action No. 82-2

Norton N. Newborn, Esq. (Gaines & Stern Co., L.P.A., Cleveland, Ohio), for the United Transportation Union.

Harry A. Rissetto, Esq., E. Carl Uehlein, Jr., Esq., Thomas E. Reinert, Jr., Esq. and Donald L. Havermann, Esq., Washington, D.C. and Dennis Alan Arouca, Esq. and David S. Fortney, Esq., Philadelphia, PA (Morgan, Lewis & Bockius, Washington, D.C., Of Counsel), for Consolidated Rail Corporation.

Elizabeth A. Rodgers, Esq. (Doyle, Playter, Novick & Berkin, Boston, MA), for UTU Local Committee of Adjustment No. 1473, Local Chairmen Connors, Maloof and Casey.

Ronald L. Gilardi, Esq. and Richard D. Gilardi, Esq. (Gilardi & Cooper, Pittsburgh, PA), for J. L. Arnold and Local 1418.

Cornelius D. Murray, Esq. (O'Connell and Aronowitz, P.C., Albany, N. Y., Thomas F. Gleason, Esq., of Counsel), for Thomas Cannon, *et al.*

J. Paul McGrath, Assistant Attorney General, Raymond M. Larizza, Esq. and Christine Nicholson, Esq., Department of Justice, Washington, D.C. (John H. Broadley, Chief Counsel and Grady C. Cothen, Jr., Esq., Federal Railroad Administration, Department of Transportation, Washington, D. C., Of Counsel), for the United States as Defendant-Intervenor.

FRIENDLY, Presiding Judge:

In this opinion we decide three cases, of which we have jurisdiction under §1152(a) of the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35, 95 Stat. 357, relating to §702 which was added to the Regional Rail Reorganization Act of 1973 (the RRR Act) by §1143(a) of NRSA. We set forth the entire section in the margin.[1]

In No. 82-4, filed on February 4, 1982, United Transportation Union (UTU) sought a judgment declaring that Consolidated Rail Corporation (Conrail) may sever employees pursuant to §702 and fail or refuse to fill vacancies created by the severance of employees pursuant to §702 only when such failure or refusal is not inconsistent with collective bargaining agreements. The complaint brought into question the interpretation of the statute and raised no issue of unconstitutionality.

On February 22, 1982, Conrail brought No. 82-7 against UTU; its president F. A. Hardin; 15 UTU General Committees for Adjustment; 19 UTU General Chairmen; 8 UTU Local Unions or Committees of Adjustment; 11 UTU Local Chairmen; and John Doe, a Conrail employee. Conrail sought to enjoin a strike allegedly threatened by defendants or certain of them to enforce the interpretation of §702 which constituted the basis for UTU's action, No. 82-4. Conrail contended that its activities were authorized by §702; it argued alternatively that defendants' threatened conduct violated the Railway Labor Act, 45 U.S.C. §151 *et seq.*, a position no longer

seriously pressed. Conrail requested a temporary restraining order and, after hearing, a preliminary injunction to be made permanent on final hearing, and damages. At a hearing on February 22, 1982, before Judge Thomsen, after he had indicated his intention to issue a temporary restraining order, it was agreed that a preliminary injunction should issue and that the case would be finally heard on March 10, 1982, along with No. 82-4, with which it was consolidated. The parties entered into stipulations of fact in both cases. UTU moved for summary judgment on the basis of these stipulations. Conrail moved for summary judgment on the basis of the stipulations and an affidavit of R. E. Swert, its Vice President, Labor Relations, accompanied by numerous exhibits. The United States was allowed to intervene in support of Conrail.

The third action, No. 82-2, *Cannon et al. v. Consolidated Rail Corporation*, was brought by two firemen and two brakemen as a class action on behalf of the class (or sub-class) of Conrail firemen and train service employees whether presently working or furloughed. The first count of the complaint alleged, as did UTU's complaint in No. 82-4, that §702 should not be interpreted as permitting violations of the collective bargaining agreements—a position abandoned by counsel at oral argument (Transcript at 22-24.) The second count alleged that the provisions of §702 authorizing Conrail to force severance and to "blank" positions vacated thereby in violation of collective bargaining agreements were unconstitutional. The complaint sought declaratory and injunctive relief and backpay. This court having issued a certificate pursuant to 28 U.S.C. §2403(a) that the constitutionality of an act of Congress had been drawn into question, the United States sought and was granted leave to intervene as a defendant. Both sides moved for summary judgment. By agreement the case, although not consolidated, was heard along with Nos. 82-4 and 82-7 on March 10, 1982.

The facts are not in dispute: As required by §702(b) and (c), Conrail moved swiftly to implement that section. Although, as discussions before the legislative committees had indicated,[2] Conrail intended to use subsection (a) to separate 4600 employees, consisting of 1300 engine service employees and 3300 train service employees, it in fact determined that it would initially terminate 3633 employees, consisting of 1303 engine service employees and 2321 train service employees, Attachment to Affidavit of R.E. Swert, March 16, 1982, and gave the notices required by §702(c) (1) and (2). See Joint Exhibit H in No. 82-4; Stipulation of Facts D.6 in No. 82-4. On October 28, 1981, Conrail sought applications for voluntary terminations of 300 engine service and 300 train service employees at 31 locations; 583 employees applied for the former and 1157 for the latter. (Stipulation of Facts D.11 in No. 82-4; Affidavit of R.E. Swert, March 4, 1982, ¶35.) On or about December 7 Conrail terminated the employment of the 600 employees and "blanked" their positions as mandated by §702(e) (1) or permitted by §702(e) (2). On January 7, 1982, Conrail solicited applications for 1660 voluntary terminations at 54 locations for engine service employees and at 60 for train service employees. (Stipulation of Facts D.13 in No. 82-4.) A sufficient number of applications having been made, Conrail terminated that number of employees on or about February 22, 1982. (Stipulation of Facts D.17 in No. 82-4; Affidavit of R.E. Swert, March 4, 1982, ¶¶41-42.) This leaves 2340 employees who may be terminated and whose positions may be blanked, see footnote 1, last paragraph. Compulsory termination under §702(d) became possible on March 10, 1982. The funds for the allowance incident to these terminations were provided to Conrail under a February 6, 1982 Grant Agreement with the Federal Railroad Administration.

DISCUSSION

1. *The History of the Problem*

The efforts of the nation's railroads to rid themselves of what they consider to be unnecessary firemen and second and third brakemen in freight service have had a long history. See *Chicago & N.W. R. Co. v. United Transportation Union,* 402 U.S. 570, 573 (1971) (citing authorities). This included the appointment of a Presidential Railroad Commission in 1960[3] and of Emergency Board No. 154 in 1963, and the adoption of a Joint Resolution, 77 Stat. 132, which established a seven-man tripartite board, Arbitration Board No. 282, which was to render a binding award effective for two years.[4] Overmanning became an issue in the Penn Central reorganization, resulting in an opinion by the reorganization judge which recommended that management set crew size unilaterally. *In re Penn Central Transportation Co.,* 347 F.Supp. 1356, 1367 (E.D. Pa. 1972). After having invoked the procedures of the Railway Labor Act without success, the Trustees in February, 1972, began the unilateral reduction of crews and UTU responded by calling a systemwide strike. Congress stepped in by enacting Public Law No. 93-5, 87 Stat. 5, which in effect rescinded the Trustees' reduction of crew size.

Neither the RRR Act of 1973 nor the RRRR Act of 1976 contained any provision dealing directly with the problem of overmanning. In September, 1978, Conrail negotiated a Crew Consist Agreement with UTU which allowed Conrail to reduce certain freight crews from one conductor and two brakemen to one conductor and one brakeman; however, Conrail could eliminate the second brakeman position only in the absence of available trainmen with seniority dates prior to the date of the agreement. The hiring of firemen continued to be governed by the Fireman Manning Agreement of July 19, 1972. This, in effect,

allowed the carriers to dispense with "firemen-helpers" in engines other than those in passenger, hostler and hostler-helper service, keeping an adequate number in training to provide engineers, but firemen having seniority on the date of the agreement could exercise this with respect to any position for which the use of firemen would have been required under the National Diesel Agreement of 1950 as in effect on January 24, 1964.

While attrition would have gradually eliminated the "protected employees" under these agreements in time if traffic had grown or even remained static, traffic declined sharply.[5] By 1980 it had become apparent not only to Conrail but to the United States Railway Administration (USRA) and the General Accounting Office that the projected savings were not being and would not be realized.[6] Indeed, the overall decline in traffic resulted in an increase in the number of trains on which Conrail has had to employ firemen.[7]

Section 405 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, authorized federal funding of a Conrail workforce reduction program if this would result in "substantial savings" to the United States. After study Conrail concluded that a severance program for train and engine service employees would be generally beneficial if, but only if, Conrail also could eliminate one position for every employee separated since otherwise the position vacated would be filled by a protected employee's exercising seniority rights. These conclusions were reported to the OMB, the FRA, the ICC and the UTU in January, February, and March 1981.[8] In all these presentations Conrail projected a surplus of 1300 firemen and 3300 brakemen.

On March 15, 1981, Conrail made a series of reports to Congress as required by §703(c) of the Staggers Act, one of these being "an analysis of the effects upon the corporation and its employees of alternative changes in labor agreements and related operational changes." Conrail,

Labor Report to Congress: Response to Staggers Act Section 703(c), at 1 (March 15, 1981). The report noted that Conrail's freight labor cost ratio had been reduced from 66% in 1977 to 56% in 1981 but that this compared adversely with a ratio of 48% for the industry excluding Conrail, an annual difference to Conrail of more than $300 million. *Id.* Reduction of the ratio would require heavy sacrifices by Conrail employees, which, however, would be much less than what would result if Conrail failed to become a viable carrier and were sold piecemeal to other carriers. *Id.* The labor contributions were to consist partly of a $200 million deferral in wage increases in the 1981 round of collective bargaining and partly by "elimination of about 10,000 employees *and* acceleration of savings permitted by productivity agreements already negotiated." *Id.* (Emphasis in original; footnote omitted.)[9] The report stated that a portion of the 10,000 reduction in Conrail employees could come from surplus train and engine employees but that:

> current labor contracts, although recognizing that firemen and second brakemen are not necessary for safe operation, provide for elimination of these employees only through attrition. It is clear that normal attrition itself, particularly in the environment of a declining traffic base, will not reduce Conrail's work force at a rate necessary for it to realize the benefits of these agreements in the near term.

Early in 1981 negotiations occurred between Conrail and the unions representing its employees including UTU. These culminated in a Labor Contribution Agreement dated May 5, 1981. This provided for changes in the national agreements with respect to wages estimated to produce savings of $200 million per annum, see, e.g., Senate Hearing II, at 35-38 (testimony of James E. Burke, Vice

President, United Transportation Union), 2-3 (testimony of L. Stanley Crane, Chairman and Chief Executive Officer, Conrail), and a moratorium on the service or processing of notices under §6 of the Railway Labor Act. At the same time representatives of Conrail and of UTU were negotiating with respect to the elimination of firemen and brakemen positions. According to Swert's affidavit, ¶20, this resulted in the joint submission to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science and Transportation of a proposal generally similar to §702 as enacted. [10]

2. *The Meaning of §702*

UTU argues that §702, and particularly §702(d) and (e), were not intended to allow Conrail to take action contravening the Fireman Manning Agreement and the Crew Consist Agreement. While its making the argument is understandable in light of the historic reluctance of both labor and management to have Congress take unto itself the resolution of labor disputes, we find the argument wholly lacking in force. Indeed, the plaintiffs in No. 82-2 join with Conrail and the United States in the view that the section was intended to supersede contrary agreements.

We look first at the words of the statute, *Southeastern Community College v. Davis,* 442 U.S. 397, 405 (1979); *Sante Fe Industries, Inc. v. Green,* 430 U.S. 462, 472 (1977), and it is hardly necessary to do more. The very first sentence of §702 says that Conrail "may terminate the employment of certain employees, in accordance with this section", not that Conrail may do so if permitted by agreement. Subsection (d) dealing with involuntary separation says that Conrail "may, after 210 days after the effective date of this title, designate for separation employees in engine service or train service respectively in inverse order of seniority" etc. No qualification is made on the score of existing agreements. The first reference to

representatives of employees comes in §703(e) (3), and this for the very limited purpose there stated and with Conrail having the right to decide if no agreement is reached. Subsection 703(e) (4) retains Conrail's contract rights to refrain from filling positions but, significantly, says nothing about the contract rights of employees. Section §702(f) says that Conrail and employee representatives "may agree on procedures to implement this section, but the absence of such agreement shall not interfere with implementation of the separations authorized by this section." Finally, if there were need for further dotting of i's or crossing of t's, §702(g) makes mandatory Conrail's separation of firemen in commuter service, which clearly intends no restraint by existing agreements to the contrary.

The compelling force of the language is augmented by other considerations discernible from the face of the statute. One is UTU's inability to suggest what purpose the elaborate provisions of §702 would serve under its construction. Conrail required no authorization from Congress to do what existing agreements permitted or to negotiate for changes in them. There can be no valid claim that §702 was needed to insure that any actions taken by Conrail of the sort therein specified would not run afoul of state full crew laws; that office was already performed by §711.[11]

A second consideration is that §702 must be read in the light of Title IV which §1142 of NRSA added to the RRR Act. Section 403 requires USRA to make profitability determinations with respect to Conrail on June 1, 1983, and again as soon after November 1, 1983, as the necessary information is available. Failure of Conrail to pass either test requires the Secretary of Transportation to initiate discussions and negotiations under §405 for the break-up of Conrail's freight service, §§403(a) (B) and (b) (B).[12] It was in the interest of both Conrail and labor that savings incident to the §702 program should begin as early as possible—not await the result of lengthy and possibly

fruitless negotiations for amendment of the Fireman Manning and Crew Consist Agreements.[13]

With the language of §702 so clear and the necessity of a literal reading in order to conform with the overall purpose of the statute so manifest, it is scarcely necessary to resort to legislative history. If we do, the answer given by the reports of the Senate, House and Conference Committees is equally plain.

The House Report on H.R. 3559, a predecessor to NRSA, said "this title also provides Conrail the opportunity to eliminate unnecessary jobs. Unneeded firemen and brakemen are eliminated upon payment of a termination allowance, saving the Corporation more than $100 million." H.R. Rep. No. 97-153, 97th Cong., 1st Sess., at 3 (1981). More specifically, the report described a section of H.R. 3559, which was almost identical to §702 as enacted, in the following terms:

> Section 702 permits Conrail to accelerate the implementation of the crew consist and firemen manning agreements so that all excess firemen and all second and third brakemen can be eliminated before the end of calendar year 1982. The firemen on the crews of trains operated in commuter service must be included by the Corporation in the termination program.

Id. at 30.

The Senate Report described §413-1 of S.1377, a forerunner of §702, in similar terms:

> [Section 413-1] contains a "Special Termination Allowance" allowing Conrail to "blank" the positions (eliminate the job with the man) vacated under the program. Separations would be limited to the numbers of excess firemen and second and

> third brakemen (including passenger firemen) presently employed by Conrail (but not necessarily the individuals occupying those positions if more senior personnel wish to be separated). About 4,600 positions are at issue, and their elimination would make the properties more saleable. This was addressed in the Conrail settlement after the DOT bill was introduced.
>
> The program would operate at the direction of Conrail but mandatorily as to affected employees (after voluntary separations were taken). The section provides for payments at the rate of $200 per month of active service with Conrail or a predecessor, with a cap of $25,000 (i.e., 4 years, 2 months of service) [*sic*].

S. Rep. No. 97-139, 97th Cong., 1st Sess., at 332 (1981). The House and Senate conferees took the same view, saying "the purpose of this program is to eliminate 4,600 employee positions; 3,300 brakemen and 1,300 firemen. In addition, all the firemen in commuter service are to be included in this program. This will result in the elimination of firemen positions in commuter service." Explanatory Statement, *supra,* at 127 Cong. Rec. S 9061 (daily ed. July 31, 1981); 127 Cong. Rec. H 5962 (daily ed. August 4, 1981).

In none of these statements is there any indication that collective bargaining agreements were intended to limit the operation of §702; indeed, the section was described as allowing Conrail "to accelerate the implementation of the crew consist and fireman manning agreements." Likewise, the principal concern reflected in the reports is ensuring that Conrail actually is able to eliminate the excess positions in question prior to the end of 1982, an outcome that UTU's reading of the provision would be unlikely to permit.

Both Conrail and UTU have referred to a multitude of materials submitted to Congress in the course of the deliberations leading to the enactment of §702. Conrail regards these as showing knowledge by the committees of Congress that the termination program would not be effective unless Conrail had the right to enforce it, including the blanking of positions, irrespective of the assent of the UTU. The latter finds solace in some references to negotiation by Conrail representatives. We find it unnecessary to pursue the subject. Our concern is not so much with what Conrail sought as with what Congress wrought. With respect to that, the language and evident purpose of the statute and the committee reports leave no room for even the smallest doubt. When the evidence revealed by an excursion into materials simply forming a part of the basis on which Congress acted is "sufficiently ambiguous . . . to invite mutually destructive dialectic but not strong enough either to strengthen or weaken the force of what Congress has enacted," a court should disregard it. *FCC v. Columbia Broadcasting System,* 311 U.S. 132, 136-37 (1940).

3. *Constitutionality: Due Process and Equal Protection*

Plaintiffs in No. 82-2 challenge the constitutionality of §702 on a number of grounds. They contend that the compulsory separation provisions of §702(d) and the "blanking" provisions of §702(e) violate the Fifth Amendment's prohibitions of the deprivation of property without due process of law and the taking of private property for public use without just compensation. They contend also that the concept of equal protection of the laws held to be embodied in the due process clause of the Fifth Amendment, see *Bolling v. Sharpe* 347 U.S. 497 (1954), is violated by §702(a)'s $25,000 ceiling on termination

allowances and by the fact that §702 applies only to Conrail. For convenience we will refer to the two former contentions as the due process contentions and to the last as the equal protection contentions.

Before discussing the due process contentions it will be useful to analyze what sacrifices §702 in fact imposes and why Congress imposed them. Clearly the employees who opt for voluntary termination have no constitutional claim. By no means will every employee who may be subjected to compulsory termination lose his employment; if he has seniority, he may exercise this to transfer to another location. Some, of course, will be terminated, but normally they will be employees with low seniority, whom Conrail was free to furlough without benefit of §702 if their services were not needed. Section §702(e) does not in itself result in the loss of a job; it simply prevents an employee from using seniority rights to bid for a superior position formerly held by a terminated employee.

As against this Congress had reason to consider that §702 would serve important public objectives. Its purposes, NRSA §1133, so far as here relevant, were to provide for "(1) the removal by a date certain of the Federal Government's obligation to subsidize the freight operations of Conrail" and "(3) an orderly return of Conrail freight service to the private sector." The preferred method for accomplishing this was to make Conrail profitable, thereby permitting its continued existence or its sale as a single entity to private interests. Failure to achieve profitability would have catastrophic consequences. Projected loss of employment from piecemeal sale was estimated to exceed 45,000. See USRA, Conrail at the Crossroads: The Future of Rail Service in the Northeast, at 51 (April 1981) and note 12 *supra*. This would impair the solvency of the Railroad Retirement System, see H. Rep. No. 97-153, 97th Cong., 1st Sess., at 153 (1981); S. Rep. No. 97-101, 97th Cong., 1st Sess., at 105 (1981), recently the subject of legislative effort to restore its

soundness, see Pub. L. No. 97-34, §741. The new federally funded employee protection program, which §1143(a) of NRSA added as §701 of the RRR Act, would be prematurely exhausted, as would the railroad unemployment insurance fund, see H. Rep. 97-153, *supra,* at 153.

While §702 alone could not assure profitability for Conrail, Congress reasonably expected it to make a significant contribution to achieving that goal. Annual savings are estimated at $70 million, for which the Government was willing to supply an estimated $115 million in termination allowances.[14] As against this, achievement of the same reduction in force under existing agreements would require twice as many terminations and produce savings of only $9 million.[15]

Our analysis of the due process contentions must begin by recognizing that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Lynch v. United States,* 292 U.S. 571, 579 (1934). However, Congress has greater freedom to deal with private contractural rights than with obligations of the Federal Government. Contrast *Norman v. Baltimore & Ohio R.R.,* 294 U.S. 240, 306 (1935), with *Perry v. United States,* 294 U.S. 330, 348, 350-51 (1935). As the Court stated in *Norman,* 294 U.S. at 307-08:

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

The principle thus stated in *Norman* had been settled long before. *Louisville & N. R.R. Co. v. Mottley (II),* 219 U.S. 467, 482 (1911), upheld the invalidation, by the 1906

amendments to the Interstate Commerce Act of 1887, of a contract settling personal injury claims of Mr. and Mrs. Mottley for passes during their respective lives. A unanimous Court, speaking through the first Justice Harlan, said:

> That the exercise of [the commerce] power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.

See also *id.* at 485-86. Relying on the *Mottley* decision, the Court in *Philadelphia, Baltimore & Washington R.R. v. Schubert,* 224 U.S. 603 (1912), upheld the constitutionality of §5 of the Federal Employers' Liability Act, 35 Stat. 65, which declared void any contract enabling a carrier to exempt itself from liability under the Act. The Court said through Justice Hughes, *id.* at 613-14:

> The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its

> sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

Again, in *Fleming v. Rhodes,* 331 U.S. 100, 107 (1947), the Court said:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

More recently, the Court, in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978), although indicating its inability "to develop any 'set formula' for determining when" compensation is required under the taking clause, identified several factors that have had particular significance in its decisions on the question. A number of considerations highlighted therein reinforce our conclusion that §702 does not effect a taking for which compensation is constitutionally required. One is that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124 (citation omitted). Another is that " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." *Id.* at 130-31. Here, as we have pointed out, §702 by no means abrogates

all rights under the pertinent agreements. Section 702(d) offers the options of a severance allowance, voluntary furlough, or the exercise of seniority at another location. Section 702(e) merely decreases the total number of jobs available on the system and thus increases the likelihood that at any given time particular employees, predominantly those with low seniority, will be on furlough and decreases the wages of employees working in less desirable positions. A third consideration is the Court's statement:

> Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck [v. Sebastian,* 239 U.S 394 (1915)], of the cedar trees in *Miller v. Schoene,* [276 U.S. 272 (1928),] and of the gravel and sand mine in *Goldblatt v. Hempstead,* [369 U.S. 590 (1962),] were uniquely burdened by the legislation sustained in those cases. Similarly, zoning laws often affect some property owners more severely than others, but have not been held to be invalid on that account.

Penn Central, 438 U.S. at 133-34 (footnote omitted). This is useful in answering the claim that Congress' action rises to the level of a taking because affected workers bear a disproportionate share of the burden of Congress' scheme to preserve rail service in the Northeast and Midwest. In contrast to the *Penn Central* decision, in *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979), where the Court concluded that a taking had occurred because the federal government's action extinguished the landowner's right to exclude, which is "so universally held to be a fundamental element of the property right", the Court was careful to note that "the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . . And even if the

Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* (citations omitted).

As stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), the Court has long "upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees . . . regardless of contravening arrangements between employer and employee." Likewise, the Court has held that legislation "readjusting rights and burdens" between employers and employees "is not unlawful solely because it upsets otherwise settled expectations." *Id.* at 16. The statement applies here *a fortiori.* Railway labor could hardly have had "settled expectations" that Congress would forever refrain from doing away with jobs which a presidential commission had found to be useless twenty years ago and which the unions, in their collective bargaining agreements, had in effect conceded to be. As the Supreme Court has articulated the broad contours of Congress' power under the Commerce Clause, it has become ever more clear that private arrangements will not be permitted to stand in the way. If we assume there are some limits beyond which Congressional action may not go, certainly these were not exceeded here.

The equal protection arguments can be disposed of even more readily. Application of the equal protection concept to invalidate economic regulation is quite restricted. In the absence of the existence of "fundamental rights" or invidious discrimination, neither of which is present here, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor

proceed along suspect lines . . . . " *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976), citing *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952).

The attack on the $25,000 ceiling is that it is irrational to apply the same maximum to an older worker with only a few years of expectable service and to a younger worker who might have anticipated many years of employment.[16] In fact, however, the younger worker's expectations are dependent on the success of the enterprise. If Conrail's traffic continues to decline or if it should be sold, particularly if it should be sold piecemeal, seniority rights might make the older worker's future longer than the younger's. In addition, a uniform ceiling is responsive to the fact that younger workers who are separated presumably are in a better position to find alternative employment. Congress was not required to fine tune the maximum separation allowance to the unpredictable merits of each individual case.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78.

Dandridge v. Williams, 397 U.S. 471, 485 (1970). See also *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 175-79 (1980). The desire to provide a simple, workable maximum on termination allowances is reason enough.

The equal protection argument based on the fact that §702 applies only to Conrail is also unavailing. No other

railroad is similarly situated. Conrail had received subsidies from the federal government in excess of $5 billion. In NRSA itself Congress extended further subordination of the $3.3 billion in federal debt to encourage the sale of Conrail stock, §402 of the RRR Act added by §1142 of NRSA; authorized an additional $262 million for the purchase of Conrail securities, §217 of the RRR Act added by §1140(a) of NRSA; and provided a federally funded labor protection program, §§ 1143 and 1144 of NRSA. Congress determined that in order to justify these expenditures Conrail must be freed from the provisions of the Fireman Manning and Crew Consist Agreements which had prevented its realizing essential savings by abolishing unneeded positions. The notion of equal protection embodied in the Fifth Amendment does not hobble Congress to the choices of doing this for all railroads or for none. "[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of the field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co., supra,* 348 U.S. at 489 (citations omitted). See also *New Orleans v. Dukes, supra,* 427 U.S. at 306, overruling *Morey v. Doud,* 354 U.S. 457 (1957).

4. *Constitutionality: The Bankruptcy Clause*

At argument counsel for three UTU local chairmen who are defendants in No. 82-7 contended, on the authority of the Supreme Court's recent decision in *Railroad Labor Executives' Ass'n v. Gibbons,* 50 U.S.L.W. 4258 (March 2, 1982), that because §702 applies only to Conrail, it violates Article I, §8, clause 4 of the Constitution empowering Congress to "establish . . . uniform Laws on the

subject of Bankruptcies throughout the United States." On its face §702, regulating the employment relations of a non-bankrupt carrier has nothing to do with bankruptcy, the "subject of the relations between an insolvent or non-paying or fraudulent debtor and his creditors, extending to his and their relief." *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 513-14 (1938). The constitutional support for §702, as indicated by the findings in §1132, especially §1132(3), and the recitals of purposes in §1133 of NRSA, is the commerce power, not the bankruptcy power.

The chairmen's argument rests solely on the fact that §702 is a part of Title VII which §1143(a) of NRSA added to the RRR Act of 1973 as amended. The decision of Congress, simply as a matter of convenient reference, to tack Title VII, which has none of the characteristics of bankruptcy legislation, onto the RRR Act did not implicate the constitutional requirement of uniformity.

5. *Injunctive Relief*

Having concluded that Congress intended §702 to operate without regard to the Fireman Manning Agreement and the Crew Consist Agreement and that the section as so construed is not unconstitutional, and that Conrail has thus proceeded lawfully in implementing those provisions, we must consider whether to make permanent the preliminary injunction previously issued in No. 82-7 as Conrail urges.

We have no doubt that the issue presented in No. 82-7 is a "labor dispute" within §13(c) of the Norris-LaGuardia Act, 29 U.S.C. §113(c). It is also plain that §4 of that Act, 29 U.S.C. §104, would prohibit us from issuing the injunction if the Norris-LaGuardia Act is applicable to our functioning under §1152 of NRSA.

We think it is not. Section 1152(c) provides that:

> Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision or amendment made by this subtitle.
> . . .

It is true that this does not speak with the pristine clarity of §10(h) of the National Labor Relations Act, 29 U.S.C. §160(h), see *Bakery Sales Drivers Local Union No. 33 v. Wagshal,* 333 U.S. 437, 442 (1948); *Building and Construction Trades Council v. Alpert,* 302 F.2d 594 (1 Cir. 1962). The failure of Congress to make specific mention of the Norris-LaGuardia Act in the "notwithstanding" provision of §1152(c) could well have been due to the fact that it wished as well to exclude the application of other laws, e.g., the provision of 28 U.S.C. §1331 vesting the district courts with jurisdiction over cases arising under laws of the United States. Its omission of express reference is no reason for failing to read its general words as meaning what they unmistakably say. Here, as in the case of "minor disputes" under the Railway Labor Act, 45 U.S.C. §151 *et seq.,* there must be an accommodation between the two statutes with the balance favoring the later and more limited one. *Virginian Ry. Co. v. System Federation No. 40,* 300 U.S. 515, 563 (1937); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.,* 353 U.S. 30, 39-40 (1957); *Chicago & N.W. Ry. Co. v. United Transportation Union,* 402 U.S. 570, 582-83 n.18 (1971). The recital of the "public policy of the United States" in §2 of the Norris-LaGuardia Act, 29 U.S.C. §102,[17] by which the courts are directed to be guided in interpreting the act and determining their jurisdiction and authority, shows how far removed the purpose of that statute is from a case where Congress itself has set labor policy for a single railroad with respect to a particular

labor problem and vested a special court of three judges with authority to enforce the Congressional decision by granting injunctive relief. Compare *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235, 250-53 (1970).

Although we thus conclude that the Norris-LaGuardia Act does not bar the injunction sought by Conrail, an injunction should not issue unless there is "some cognizable danger of recurrent violation". *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). When the preliminary injunction was issued in No. 82-7, such a danger plainly existed. Conrail's complaint alleged (Appendix B) that UTU's president had authorized subordinate UTU general committees to conduct strike votes in connection with Conrail's implementation of §702; that certain such committees had conducted such votes; and that they and certain UTU local officers had informed Conrail and the general public that a work stoppage would be conducted. Employees would report to work on February 22, 1982, and ascertain the crew or work assignments which they had received. If a crew was scheduled to operate with a position blanked under the §702 program, it would refuse to work; if Conrail disciplined an employee for such refusal, a general strike would ensue. The Affidavits of Conrail's Vice-President—Labor Relations, R.E. Swert, and other Conrail officials in support of its motion for a temporary restraining order elaborated upon this and on the serious harm which a strike would cause to Conrail and to the country. Counsel for UTU did not challenge Conrail's allegations. Indeed UTU later stipulated that certain UTU general committees had voted to take strike action against Conrail in support of UTU's view that §702 did not supersede existing agreements; that UTU was prepared to grant strike authority to such committees unless enjoined by this court; and that if such authority was issued some Conrail employees represented by UTU would strike.

Before this court the defendants in No. 82-7 have contended that there will be no need for an injunction once we decide the legal issues. The brief for UTU states (p. 12):

> Nevertheless, if this Court rules against the UTU or any appropriate appeals decision is against the UTU, the UTU would not sanction a strike. Thus, the determination of the underlying dispute will, we believe, moot the Norris-LaGuardia Act issue.

Counsel for UTU said at argument:

> If you determine it against us, I think I indicated in our pleadings, in our brief to the Court, that the union is not going to defy the Court and order a strike in violation of the Court's ruling.

Transcript at 10; see also *id.* at 11. Counsel for local chairmen, Casey, Connors and Maloof, who had expressed the greatest opposition to Conrail's actions, stated:

> If you rule [against us] . . . then they won't have a right under Section 6 to go on strike. . . . As far as I know, they won't. But they have been completely lawabiding up until this point, and there is no reason for the Court to believe that they would not continue to be so.

Transcript at 49-50. Counsel for Local 1418 who spoke briefly was not asked about this question and did not address it.

In view of these unequivocal representations, which we expect to be fulfilled, we cannot find that the threat of a strike is now so real or imminent as to warrant a permanent injunction. It is important, however, not only that there should be no strike that would directly frustrate the

will of Congress, but also that shippers should perceive Conrail as being as free as possible from the likelihood of such a strike. Otherwise the efforts of Congress to enable Conrail to achieve profitability might be seriously jeopardized. We therefore think it desirable to alert the parties to our present inclination, in the event that an illegal strike should be actually threatened, to issue immediately a temporary restraining order and then to provide Conrail with other appropriate relief. At this point counsel have not suggested what new arguments could be made, in the event of renewed threat of a strike, that would lead us to deny a temporary restraining order or a preliminary injunction. Our decision should thus not be taken to reflect on the appropriateness of injunctive relief when and if a proper showing has been made that a strike is likely—an event we trust will not occur. We hold only that at the present time a permanent injunction is not appropriate.

Judgment will be entered in Nos. 82-4 and 82-7 declaring that §702 added to the RRR Act by §1143(a) of NRSA confers authority on Conrail to take the actions there specified without regard to the Manning Agreement, the Crew Consist Agreement or any other collective bargaining agreement. Judgment will be entered in No. 82-7 vacating the injunction entered on February 22, 1982, and denying Conrail's motion for a permanent injunction. Judgment will be entered in No. 82-2 rejecting all constitutional challenges to §702. If Conrail desires a more detailed form of judgment, it may submit one for settlement on five days' notice.

HENRY J. FRIENDLY
Presiding Judge
JOHN MINOR WISDOM
Judge
ROSZEL C. THOMSEN
Judge

Dated: March 31, 1982

FOOTNOTES.

[1]§702(a) GENERAL.—The Corporation may terminate the employment of certain employees, in accordance with this section, upon the payment of an allowance of $350 for each month of active service with the Corporation or with a railroad in reorganization, but in no event may any such termination allowance exceed $25,000.

(b) EMPLOYMENT NEEDS.—Within 90 days after the effective date of this title, the Corporation shall determine, for each location, the number of employees that the Corporation intends to separate under subsection (a) of this section.

(c) NOTIFICATION AND SEPARATION PROCEDURE.—(1) Within 90 days after the effective date of this title, the Corporation shall notify its employees of their rights and responsibilities under this section.

(2) Within 90 days after the effective date of this title, the Corporation shall notify each train and engine service employee eligible to be separated under paragraph (3) that such employee may be entitled to receive a separation payment under this section if such employee files a written request to be separated. Such notice may be revised from time to time.

(3) If the number of employees who request to be separated pursuant to paragraph (2) of this subsection is greater, in engine service at any location, than the number of excess firemen at the location, and in train service at the location than the number of excess second and third brakemen, as determined by the Corporation, the Corporation shall separate the employees described in paragraph (2) of this subsection in order of seniority beginning with the most senior employee, until the excess firemen and second and third brakemen positions at that location, as determined by the Corporation, have been eliminated.

(d) DESIGNATED SEPARATIONS.—If the number of employees who are separated pursuant to subsection (c)(3) is less at any location than the number of excess firemen in freight and commuter service and second and third brakemen in freight service at such location, as determined by the Corporation, the corporation may, after 210 days after the effective date of this title, designate for separation employees in engine service or train service respectively in inverse order of seniority, beginning with the most junior employee in active service at such location until the excess firemen in freight and commuter service and second and third brakemen in freight service, at that location have been eliminated. An employee designated under this subsection may choose (1) to furlough himself voluntarily, in which case the next most junior employee protected under the fireman manning or crew consist agreements or any other agreement or law, in the same craft or class at such location may be separated instead and receive the separation allowance, or (2) to exercise his seniority to

another location, in which case the Corporation may separate, under the provisions of this subsection, the next most junior protected employee in active service at the location to which seniority ultimately is exercised.

(e) EFFECT ON POSITIONS.—(1) The corporation shall refrain from filling one fireman position in freight service, or in commuter service where applicable, for each employee in engine service separated in accordance with this section.

(2) The corporation may refrain from filling one brakeman position in excess of one conductor and one brakeman on one crew in freight service for each employee in train service who is separated in accordance with this section.

(3) Positions permitted to be not filled under this subsection shall be not filled in different types of freight service actually operated at or from the location in a sequence to be agreed upon between the Corporation and the general chairman representative of classes or crafts of employees having jurisdiction over the positions to be not filled. If no such agreement is reached, the Corporation may designate the position to be not filled.

(4) Notwithstanding paragraphs (1) and (2) of this subsection, the Corporation shall retain all rights it has under any provision of law or agreement to refrain from filling any position of employment.

(f) PROCEDURES.—The Corporation and representatives of the various classes and crafts of employees to be separated may agree on procedures to implement this section, but the absence of such agreement shall not interfere with implementation of the separations authorized by this section.

(g) COMMUTER EMPLOYEES.—The provisions of this section shall apply to the separation of firemen in commuter service, except that with respect to such employees the Corporation is required to make the separations authorized by this section.

Section 713 authorized $385,000,000 to be appropriated to carry out the provisions of Title VII, entitled "Protection of Employees," of which §702 formed a part. Not more than $115,000,000 was to be available solely for termination allowances under §702. Assuming that all terminated employees would qualify for the $25,000 maximum permitted by §702(a), the $115,000,000 would provide for 4600 terminations.

[2]Explanatory Statement of the House and Senate Conferees with Respect to Subtitles E, F, and G of Title XI of the Omnibus Reconciliation Bill (H.R. 3982) [hereafter Explanatory Statement], 127 Cong. Rec. S. 9056, 9060-61 (daily ed. July 31, 1981); Northeast Rail Service Act of 1981, Hearing before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, United States Senate, 97th Cong., 1st Sess. [hereafter Senate Hearing II] 38, 41-43 (1981) (Comments of James E. Burke, Vice President, United Transportation Union).

[3]The Commission recommended that the parties agree to eliminate the unnecessary positions through attrition, with job protection extended to present employees; the carriers accepted this proposal but the unions rejected it.

[4]Arbitration Board No. 282 found the fireman position obsolete and authorized the elimination of all firemen positions subject to restoration of up to 10% by union officers for engineer training purposes. It remanded the train service crew consist dispute back to the carriers and unions for local arbitration. This resulted in eliminating some second brakemen positions but full implementation was impaired by state full crew laws.

[5]See, e.g., Conrail, Options for Conrail, Conrail's Response to Section 703(c) of the Staggers Rail Act of 1980, at 8-7, 8-A-7 (April 1, 1981); USRA, Conrail at the Crossroads: The Future of Rail Service in the Northeast, at 10 (April 1981); United States Department of Transportation, Federal Railroad Administration, Recommendations for Northeast Rail Service, at C-2 to C-3 (1981).

[6]USRA, Cost and Productivity—Train and Engine Service, Conrail vs. Selected Other Carriers—1980, at 15-43 (1981); Report by the Comptroller General of the United States, Conrail's Attempts to Control Labor Costs and Improve Its Labor Productivity (1980).

[7]See authorities cited in note 5 *supra*.

[8]See Exhibits I, J, and K to Affidavit of R.E. Swert, March 4, 1982.

[9]A third element was "protection of Conrail against new labor cost obligations resulting from statutory employee protection requirements or from collective bargaining or transfer of function or lines to others without the transfer of involved employees." Conrail, Labor Report to Congress: Response to Staggers Act Section 703(c), at 2 (March 15, 1981).

[10]Vice President Burke of UTU has submitted an affidavit denying that he or other union representatives agreed that UTU-Conrail agreements were superseded by Congressional legislation. He does not deny Swert's assertion that the proposal was jointly submitted and that Conrail understood it would supersede existing agreements. Review of documents submitted by Conrail, notably a letter from President Hardin of UTU to General Chairman Doar dated December 8, 1981, indicates to our mind UTU's then understanding that §702 superseded *pro tanto* the Fireman Manning Agreement and the Crew Consist Agreement. However, we do not rest our decision on this in any degree.

[11]§711. No State may adopt or continue in force any law, rule, regulation, order, or standard requiring the Corporation, the National Railroad Passenger Corporation, or the Amtrak Commuter Services Corporation to employ any specified number of persons to perform any particular task, function, or operations, or requiring the Corporation to pay protective benefits to employees, and no State in the Region may adopt or continue in force any such law, regulation, order, or standard with respect to any railroad in the Region.

[12]Fred J. Kroll, Chairman of the Railway Labor Executives' Association, testified that a sale of Conrail's lines to other operators would result in the loss of more than 40,000 jobs, over half of Conrail's freight employment. Consolidated Rail Corporation, Hearings before the Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce, House of Representatives, 97th Cong., 1st Sess., at 486-87 (1981); Conrail Reauthorization, Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transporation, United States Senate, 97th Cong., 1st Sess., at 63, 66, 68 (1981).

[13]The Supreme Court has characterized the Railway Labor Act's procedures regarding major disputes as "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 149 (1969).

[14]This assumes that each terminated employee will receive the maximum of $25,000. See Affidavit of R.E. Lindquist in support of Conrail's motion for summary judgment in Nos. 82-4 and 82-7, March 9, 1982.

[15]*Id.*

[16]The $25,000 maximum, of course, has no effect on employees with less than six years of qualified service.

[17]§102. Public Policy in labor matters declared

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisidiction and authority of the courts of the United States are enacted.

29 U.S.C. §102.

APPENDIX B.

Judgment Dated April 7, 1982.

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

THOMAS CANNON, ROBERT STILLWELL, DONALD R. BREWER, and DAVID L. PETERSON, On Behalf of Themselves and All Other Similarly Situated "Firemen" and "Train Service Employees" Affected by the Northeast Rail Service Act of 1981,

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Civil Action No. 82-2

This action having come on for hearing on March 10, 1982, on cross motions for summary judgment, the issues having been duly heard and the Court having filed its opinion on March 31, 1982,

IT IS ORDERED AND ADJUDGED, in accordance with that opinion, that Plaintiffs' complaint challenging the constitutionality of §702 of the Regional Rail Reorganization Act of 1973, as amended by §1143(a) of the Northeast Rail Service Act of 1981, is hereby dismissed on the merits.

April 7, 1982

HENRY J. FRIENDLY
Presiding Judge

Opposition

1

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Nos. 81-1967
81-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS CANNON, *et al.*,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

UNITED TRANSPORTATION UNION,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The Special Court, Regional Rail Reorganization Act Of 1973

BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

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May 28, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

I. Whether the Special Court, Regional Rail Reorganization Act of 1973, correctly interpreted the Northeast Rail Service Act of 1981 to supersede inconsistent collective bargaining agreements that require Conrail to continue the employment of certain employees in excess positions that the Act permits Conrail to eliminate.

II. Whether Congress violated the Taking and Due Process clauses of the Fifth Amendment to the United States Constitution by affecting the employment relationship between Conrail and its employees through legislation allowing Conrail to separate certain employees and refrain from filling certain positions covered by existing collective bargaining agreements.

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IN THE

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On Petition For A Writ Of Certiorari To The Special Court, Regional Rail Reorganization Act Of 1973

BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

Respondent, Consolidated Rail Corporation (hereinafter "Conrail") respectfully requests that the Petition for a Writ of Certiorari of Petitioners Cannon, *et al.*, and the Petition for a Writ of Certiorari of Petitioner United Transportation Union (hereinafter "UTU" or "Union") to review the judgments of the Special Court, Regional Rail Reorganization Act of 1973, entered on April 7, 1982 in the consolidated Cases Nos. 82-2, 82-4, and 82-7, be denied.

OPINION BELOW

The opinion and judgments of the Special Court have been reproduced as appendices to the Petitions in Case No. 81-1967 and Case No. 81-1992.

JURISDICTION

The Special Court possessed exclusive original jurisdiction over the statutory and constitutional issues raised in the decision below, pursuant to Section 1152(a) of the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 676 (1981). Under Section 1152(b) of the Act, appellate review of the judgment of the Special Court is within the exclusive jurisdiction of the Court upon a petition for a writ of certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Northeast Rail Service Act of 1981 and the Railway Labor Act have been reproduced in the appendix to the Petition in Case No. 81-1992. The Petition in Case No. 81-1967 raises issues under the Fifth Amendment to the United States Constitution, portions of which are reproduced therein at 2.

STATEMENT OF THE CASE

Petitioners are Conrail employees, and their representative labor organization, who challenge the carrier's implementation of Section 702 of the Regional Rail Reorganization Act of 1973 (hereinafter "3R Act"), 45 U.S.C. § 701 *et seq.*, enacted in Section 1143(a) of the Northeast Rail Service Act of 1981 (hereinafter "NRSA"), Pub. L. No. 97-35, 95 Stat. 662 (1981), a provision intended to improve the financial viability of Northeast rail service by reducing the high labor costs attributable to excess manning requirements. The problem of unnecessary firemen and second and third brakemen positions in the railroad industry has been a persistent one requiring the attention of the

courts and Congress for more than twenty years.[1] Briefly stated, carrier efforts to eliminate these obsolete and extraneous positions have been resisted by labor, at a high cost to national rail service. Certain collective bargaining agreements, known as the Firemen Manning and Crew Consist Agreements, have required the preservation of unneeded firemen and brakemen positions, and have limited the carrier's workforce reduction programs to those which can be accomplished through attrition.

In enacting the Northeast Rail Service Act of 1981, Congress gave Conrail a final opportunity to achieve financial viability, a goal which has eluded the carrier since it was established by conveyance from the insolvent Northeastern railroads under the 3R Act. *See Regional Rail Reorganization Cases*, 419 U.S. 102 (1974). The alternative, which is still possible if Conrail fails the profitability tests set forth by the Act, is a piecemeal sale of

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[1] The controversy has been reviewed often by Congress and the courts. *See Chicago & Northwestern Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 574 (1971); *Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284, 285-88 (1963); *Locomotive Firemen & Enginemen* v. *Chicago, B. & O. R. Co.*, 225 F. Supp. 11, 14-17 (D.D.C.), *aff'd* 331 F.2d 1020 (D.C. Cir. 1964); *Railroad Trainmen* v. *Akron & B. B. R. Co.*, 385 F.2d 581, 588-592 (D.C. Cir. 1967); *Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 383 F.2d 225 (D.C. Cir. 1967), *cert denied*, 389 U.S. 1047 (1968). In 1963, Congress temporarily resolved the dispute by requiring its submission to arbitration, but that arbitration ruling was subject to change after two years, *see* Joint Resolution No. 102, Pub. L. No. 88-108, 77 Stat. 132 (1963). Congress later prevented the Penn Central Trustees from removing excess firemen and brakemen by enacting Joint Resolution No. 59, Pub. L. No. 93-5, 87 Stat. 5 (1973). In Section 405 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress authorized payment to severed Conrail employees, including train and engine service employees, only if the payments would achieve "substantial savings" for the United States. Cannon Pet. App. at A7. In 1981, Congress addressed the excess manning issue on Conrail by adding Section 702 to the 3R Act in Section 1143 of NRSA.

Conrail assets, an action which has been estimated as potentially resulting in the loss of 40,000 railroad jobs. [2]

Among other measures designed to improve Conrail's profitability, the Northeast Rail Service Act through Section 702 authorized Conrail to eliminate unnecessary firemen and brakemen positions. Conrail is empowered to determine the number of excess positions at various locations throughout the system, and then offer voluntary terminations to relevant employees by location. Employees are chosen after bidding on the basis of seniority and can receive up to $25,000 in severance payments. Section 702 also permits Conrail to designate less senior employees for involuntary termination if there are insufficient numbers of employees volunteering at a particular location. However, because to date the carrier has received more applications for voluntary terminations than slots available, involuntary termination has been unnecessary. If involuntary termination is implemented, designated employees will actually be able to maintain their employment status through an exercise of seniority and transfer of work location or by voluntarily accepting furlough status. Conrail has implemented Section 702 in three phases, in December 1981, February 1982, and May 1982. Thus far, approximately 2700 employees have been terminated voluntarily, and potentially 4600 employees will ultimately be terminated.

Section 702 also authorizes Conrail to "blank," i.e., refrain from filling, one excess fireman or brakeman position for every employee terminated. [3] Thus, it is the blanking process which enables the carrier to eliminate excess positions. The employees arguably adversely affected by Section 702, and those

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[2] *See* n. 6, *infra*, p. 10.

[3] Congress also provided that elimination of excess positions would not be hindered by operation of state full crew laws, which are preempted by Section 711 of the Act.

Petitioners purportedly represent, are employees who, in the absence of the Act, would have had an opportunity to bid into the blanked positions.

The decision of the Special Court below arose from several independent actions. Initially, Petitioners Cannon *et al.*, filed Case No. 82-2, which posed a constitutional challenge to Section 702. Subsequently, on February 4, 1982, Petitioner United Transportation Union filed the action in Case No. 82-4, seeking declaratory and injunctive relief that Conrail's implementation of Section 702 was inconsistent with existing agreements and the statutory provisions. Despite the pendency of that litigation, the UTU threatened an unlawful work stoppage against Conrail's implementation of Section 702. Conrail was forced to initiate Case No. 82-7, in which it sought and obtained on February 22, 1981, preliminary injunctive relief against the Union's threatened strike. The Special Court consolidated for purposes of argument Conrail's request for permanent injunctive relief in Case No. 82-7, and the merits in Case Nos. 82-2, 82-4, in which the parties filed cross-motions for summary judgment. After the hearing on March 10, the Special Court on March 31, issued its decision and order, which granted Conrail's motions for summary judgment in Cases Nos. 82-2, 82-4, thus approving the carrier's implementation of Section 702 and upholding the provision's constitutionality. The Special Court declined to issue a permanent injunction in Case No. 82-7, citing the assurances of union and employee counsel that further job actions would not occur over the implementation of Section 702.

Petitioners in Case No. 81-1967 and Case No. 81-1992 present here, as they did below, inconsistent challenges to Conrail's implementation of Section 702. Petitioner United Transportation Union asserts that Conrail has improperly interpreted Section 702 as preempting inconsistent provisions of operative labor agreements, and that the Special Court erred in

approving this construction. In contrast, Petitioners Cannon, *et al.*, agree with Conrail and the Special Court in their interpretation of Section 702, but assert that by superseding inconsistent provisions of collective bargaining agreements, the Act violates the Fifth Amendment protections relating to due process, uncompensated taking, and equal protection.

REASONS FOR DENYING THE WRIT

I. The Special Court Correctly Held That The Separation Procedure Established By Section 702 Of The Act Supersedes Collective Bargaining Agreements.

The Special Court, Regional Rail Reorganization Act of 1973, was originally established by Congress to exercise exclusive jurisdiction over certain specific matters arising out of implementation of the 3R Act, as amended. The Special Court's continued responsibility for the adjudication of disputes involving Conrail-related legislation was provided for by Section 1152 of the Northeast Rail Service Act, which states that:

> The Special Court shall have original and exclusive jurisdiction over any civil action—
>
> 1) for injunctive, declaratory or other relief relating to the enforcement, operation, execution or interpretation of any provision or amendment made by this subtitle or administrative action taken thereunder to the extent such action is subject to judicial review.

Pub. L. No. 97-35, § 1152, 95 Stat. 676 (1981). Thus, Congress has established a single three-judge district court of the United States and vested it with jurisdiction to resolve disputes regarding interpretation of the Northeast Rail Service Act. [4]

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[4] Subsection (b) of Section 1152 provides that judgments of the Special Court, subject to one presently inapplicable exception, are reviewable only upon petition for a writ of certiorari to the Supreme Court. Review by the Supreme Court is exclusive and any petition must be filed within twenty days after entry of the Special Court's order or judgment.

The decision of the Special Court herein specifically addressed and resolved the issues presented in this Petition. The court utilized traditional techniques of statutory interpretation: it analyzed the words of the statutory provision and its legislative history. The court's conclusion, contrary to the arguments in the Petition, is neither surprising nor far-reaching.

The wording of Section 702 of the Act and its legislative history are mutually supportive. Together, they are an expression of a clear Congressional intent to provide for the prompt implementation of a severance program targeted at unnecessary positions and employees. It is indisputable that both the purpose and intended effect of the UTU's lawsuit and concurrent strike threats were to delay implementation of this procedure through the interposition of the very collective bargaining agreement provisions that gave rise to the legislation. The urgent need for prompt implementation is apparent from the two provisions in the Section 702 procedure that permit union involvement in the program. Both Section 702(e)(3) and Section 702(f) provide opportunities for Conrail-Union discussions with respect to the implementation of the statute. But both provisions authorize unilateral implementation by Conrail if an agreement cannot be reached. The time-sensitive character of the severance procedures is consistent with the overall purposes of the Act: to provide viable rail service in the Northeast, and to ensure the "removal by a date certain of the federal Government's obligation to subsidize the freight operation of Conrail," Pub. L. No. 97-35, §§ 1132, 1133(1), 95 Stat. 644 (1981).

There are no special or important reasons supporting review by the Court on a writ of certiorari. *See* Sup. Ct. R. 17.1. Because the Special Court has original and exclusive jurisdiction over the dispute, its decision cannot and does not conflict with the decision of another federal or state court. The interpretation of a statutory provision contained in the Northeast

Rail Service Act, although of significance to the parties in this litigation, does not involve an important question of federal law which has not been but should be settled by this Court. Every major piece of legislation addressing reorganization of the Northeast rail system has affected the collective bargaining relationship between Conrail and the unions representing its employees.[5] The Special Court's interpretation of Section 702 is not "a radical departure in federal labor law," but rather a plain reading of Congress' endeavor to solve a serious problem. Finally, there is no representation in the Petition that the judicial proceedings below call for the exercise of the Court's supervisory responsibilities. Thus, the Petition fails to state important reasons why the Court should grant the Petition and review the Special Court's decision interpreting Section 702 of the 3R Act, as added by NRSA.

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[5] The 3R Act of 1973 contained special provisions governing the transfer of employees from bankrupt railroads to the newly created Conrail, including provisions for an agreement to implement transfers, subsequent bargaining between Conrail and the rail employee unions, job assignments, subcontracting of work, and the transfer of work, Pub. L. No. 93-236, §§ 503, 504, 87 Stat. 1004 (1979). The 3R Act also provided over $300 million in payments to employees who were adversely affected, Pub. L. No. 93-236, § 505, 87 Stat. 1004 (1973).

The Railroad Revitalization and Regulatory Reform Act of 1976 intervened in the collective bargaining between Conrail and its employees by creating a special procedure for negotiation of transfer of Conrail employees to Amtrak, as well as amending the employee protection provisions of the 3R Act, Pub. L. No. 94-210, §§ 615, 616, 90 Stat. 31, 115 (1976).

The Staggers Rail Act of 1980 amended the 3R Act as it applied to displacement allowances, system-wide bargaining, and protection payments, Pub. L. No. 96-448, §§ 501, 502, 504(d), 506, 507, 94 Stat. 1948-53, 1956 (1980).

The Northeast Rail Service Act of 1981 intervenes in the collective bargaining process by *inter alia*, regulating employee transfer agreements, Pub. L. No. 97-35, § 1145, 95 Stat. 669 (1981), and amending the employee protection payment provisions of Section 702 of the 3R Act at issue in this case, Pub. L. No. 97-35, § 1143(a), 95 Stat. 662 (1981).

II. The Decision Below Properly Recognized Congress' Constitutional Authority Under The Commerce Clause To Adjust Economic Expectations Of Employers And Employees

Petitioners Cannon *et al.* in Case No. 81-1967 concede the far-reaching authority of Congress to regulate interstate commerce. Cannon Petition at 14. Where such authority exists, Congress is "unrestricted except by the limitations upon its authority to be found in the Constitution." *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 480 (1911). No such restrictions are evident in this litigation. To the contrary, Petitioners fall within that class of persons who, having made an agreement affecting interstate commerce, are obligated to recognize that the agreement

> must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist.

Id., at 482.

When the subject matter of the agreement affects rail transportation, the "possibility" identified in *Mottley* must be considered to rise to the level of a likelihood. "Railroads have been subject to comprehensive federal regulation for nearly a century" and federal intervention in relationships between employers in the rail transportation industry and their employees has existed for almost a similar period of time. *United Transportation Union* v. *Long Island Rail Road Co., et al.*, ____ U.S. ____, 102 S.Ct. 1349, 1355 (1982) (footnote omitted).

The Cannon Petitioners are challenging the continued attempt by Congress to complete the work it commenced with the 3R Act, to provide private rail freight service to the Northeast

and Midwest regions. They seek the issuance of a writ by asserting certain Fifth Amendment limitations on the Congressional exercise of its commerce power in the Northeast Rail Service Act. Petitioners argue that to ignore these limits would allow Congress the unfettered right to abrogate the terms of collective bargaining agreements in order to ensure the profitability of private corporations at the expense of that organization's employees. This case simply does not present such a broad issue.

A. Congress' Public Policy Objectives Outweigh The Adverse Effect On The Contractual Expectations Of The Employees

The acknowledged purpose of NRSA as a whole, and Section 702 in particular, was to provide for the viability of rail service in a major portion of the country without the need for a continuing drain on the public treasury and, not incidentally, to improve chances for long-term employment for Conrail's employees.[6] To accomplish this, Congress focused, *inter alia*, on reducing labor costs, by expediting a process of eliminating excess positions that had been agreed upon by the parties to collective bargaining agreements. Cannon Pet. App. at A6-A7. In doing so, it neither "annihilated" nor set aside the collective

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[6] The express purpose was to achieve "profitability" so that Conrail may be sold as a "going enterprise" rather than piecemeal. Piecemeal dispositions of Conrail assets could result in the loss of over 40,000 jobs according to the Chairman of the Railway Labor Executives' Association. Consolidated Rail Corporation: Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. at 486-87 (1981); Conrail Reauthorization: Hearings before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 1st Sess., at 63, 66, 68 (1981). There is no indication in the legislative history that Congress' purpose in seeking to make Conrail profitable was to achieve a "gain" on the sale of Conrail stock owned by the government. To the contrary, in NRSA Congress extended further subordination of the $3.3 billion in federal debt to encourage the sale of Conrail stock. Cannon Pet. App. at A-21.

bargaining agreements. Wages, hours, and working conditions remain the same. Section 702 relies on seniority provisions of collective bargaining agreements for the selection of employees to be separated. Further, the relative relationships between employees of Conrail based upon pertinent lengths of service remain unaffected, and seniority may continue to be exercised to fill available job vacancies or maintain an employment relationship.

What Section 702 arguably does affect are two expectations, neither of which is contractually guaranteed: first, continued employment for a particular number of employees for an indefinite period of time; and second, the availability of specific job openings which might be filled by the exercise of seniority. These expectations were both prospective and contingent upon many uncontrollable factors, not the least of which was the continued viability of Conrail. Therefore, Section 702 presents a rational and reasonable manner for "readjusting rights and burdens" between employers and employees to achieve a public purpose. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

The Special Court's decision below, contrary to Petitioners' allegations, does not represent broad judicial approval of Congressional annulment of rights under collective bargaining agreements. Section 702 was intended to correct a longstanding problem in an industry that has been traditionally the subject of extensive Congressional intervention. Examining both the legislative attempts to deal with the crew manning issue[7] and the judicial interest in the same subject,[8] it is clear that Petitioners' asserted broad ranging implications of the decision below

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[7] *See* Joint Resolution No. 102, Pub. L. No. 83-108, 77 Stat. 132 (1963); Joint Resolution No. 59, Pub. L. No. 93-5, 87 Stat. 5 (1973).

[8] *See Chicago & Northwestern Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 573 (1971) and *Penn Central Transportation Co.*, 347 F. Supp. 1356, 1367 (E.D. Pa. 1972).

do not exist. The problem and the Congressional reaction to it are *sui generis*. The right of Congress to insert itself in the collective bargaining process in the rail industry has long been acknowledged and confirmed by this Court. *United Transportation Union* v. *Long Island Rail Road*, ____ U.S. ____, 102 S.Ct. 1349, 1355 (1982) citing, *inter alia*, Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. 151 *et. seq.* (1976). The fact that Congress is now asserting itself in the context of Conrail to resolve the excess manning problem, instead of deferring the issue[9] or abiding it[10] as it has in the past, does not provide a basis for the Court to grant a writ of certiorari.

The fact that Section 702 affects only the relationship between a single carrier and its employees is of no significance. As this Court has recently recognized, the Commerce Clause does not require uniformity of legislation as to either geographical areas of the United States or as to two members of a similarly situated class. *Hodel* v. *Indiana*, 452 U.S. 314, 331-33 (1981), *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950). *See also Railway Labor Executives Association* v. *Gibbons, Trustees, et al.*, ____ U.S. ____, 102 S.Ct. 1169, 1176 (1982). More importantly, the facts amply demonstrate that there is no other entity in a similar

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[9] In 1963, Congress adopted Joint Resolution No. 102, Pub. L. No. 88-108, 77 Stat. 132 which established an arbitration board to address the issue, resulting in a temporary solution of two years' duration, thus deferring a final resolution.

[10] In 1972, the Penn Central reorganization trustees began unilateral reduction of crews after unsuccessfully bargaining with the UTU. Congress responded by enacting Joint Resolution No. 59 Pub. L. No. 93-5, 87 Stat. 5, "which in effect rescinded the Trustees' reductions in crew size," Cannon Pet. App. at A6, and continued the *status quo*.

situation as Conrail, with its Congressionally-mandated history of reorganization and oversight. [11]

B. The Petition Presents No New Issues For The Court's Consideration Under Either The Due Process Or Taking Clauses Of The Fifth Amendment

1. Section 702 Meets All Accepted Standards For "Due Process"

Shorn of its alleged consequences to the collective bargaining system in this country, the Cannon Petition is narrowed to an attempt to establish that in "adjusting the burdens and benefits of economic life . . . the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 15. In this context, Petitioners present no demonstrable evidence of arbitrary and irrational action by Congress. [12]

The facts and argument above demonstrate that the action of Congress in passing Section 702 clearly meets the traditional

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[11] Certainly the Delaware & Hudson Railway Company and the Central Vermont Railway, Inc., cited by Petitioners (Cannon Pet. at 4, n.**) lack a significant federal-nexus and do not demonstrate that there are others "similarly situated." Thus the fallacy of Petitioners "singling out" argument is clear. As the Court below recognized in rejecting Petitioners equal protection argument, "no other railroad is similarly situated." Cannon Petition, at A20-21.

[12] The Petitioner's argument that collective bargaining was a viable alternative, leaving the Congressional choice of methods highly questionable, Cannon Petition at 11, deserves little attention. The Ford and GM results occurred in a wholly inapposite context and in a radically different industry. The failure of the railroads and unions to solve the crew-manning issue in the past is well-documented in legislation and judicial decisions. Even a Congressional mandate to try once again could not possibly keep the Congressional time-table for "profitability" by 1984 given the "interminable" bargaining procedures established under the Railway Labor Act. *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 149 (1969).

framework for measuring Congressional action under the Due Process requirements of the Fifth Amendment. *See Nachman* v. *Pension Benefit Guarantee Corporation*, 592 F.2d 947 (7th Cir.) *aff'd on other grounds*, 446 U.S. 359 (1980). *See also Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934) (14th Amendment due process and Contract Clause analysis); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Contract Clause analysis). The reliance interest of those who arguably are adversely affected, the most junior employees on the seniority list, is minimal. Cannon Pet. App. at A18. There is no doubt that labor relations in the railroad industry and the crew-manning question have previously been subjected to regulatory control. Further, it is not difficult to judge the equities of the severance of 4600 employees (all of whom, to date, have left voluntarily, payment in hand) against the potential for the loss of more than 40,000 jobs and a significant diminution in rail service in a major section of the country. Finally, it is clear that Congress designed Section 702 to limit and moderate the impact of the burden, by providing monetary payments and the alternatives of transfer or furlough.

2. The Petitioners Have Neither Suffered A Loss Of "Property" Nor A "Taking" Protected By The Fifth Amendment

For the purpose of the Taking Clause, this Court has recognized "property"

> to denote the group of rights inherent in the citizens' relation to the physical thing, as the right to possess, use and dispose of it.

United States v. *General Motors Corp.*, 323 U.S. 373, 378 (1943). Even where this Court has spoken of "economic rights" backed by the force of law, *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502 (1945), such rights for the purposes of the Taking Clause accrue on the basis of a relationship to physical property. *U.S.* v. *Willow River Power Co.*,

324 U.S. at 509-11. (No riparian rights affected and therefore no property rights compensable under the Fifth Amendment.) Rather, what the Court has before it are collective bargaining agreements between private parties which, at most, arguably have been impaired by the exercise of Congressional authority under the Commerce Clause. [13] There has been no cancellation of a contract, *cf. Lynch* v. *United States*, 292 U.S. 571 (1934) and *Perry* v. *United States*, 294 U.S. 330 (1935), nor any direct appropriation of contract rights through the government's replacement of itself as a party to a private agreement, *see Legal Tender Cases*, 12 Wall. 457, 79 U.S. 287, 312 (1871); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (1924); *cf. Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 510-11 (1922).

It is recognized that government actions here may have adversely affected economic expectations, but economic harm without appropriation by the government is not sufficient in and of itself to constitute a taking. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-25 (1978); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945). Similarly, as this Court has recognized

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

Cannon Pet. App., at A17, citing *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 130-31 (1978).

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[13] Because the Contract Clause is not applicable to the federal government, such impairment is analyzed under the Fifth Amendment due process requirement, as discussed *supra*. *See Nachman* v. *Pension Benefit Guarantee Corporation*, 592 F.2d 947 (7th Cir.) *aff'd on other grounds*, 446 U.S. 359 (1980).

In the instant case, the collective bargaining agreements remain. What has been affected are, at best, inchoate expectations arising out of those agreements. They do not rise to the level of property protected under the Taking Clause, nor present an important question of federal law warranting this Court's grant of review. Therefore, the Cannon Petitioners reasons for granting the writ to review the Special Court's interpretation of Section 702 of the 3R Act, as added by NRSA, are unavailing.

CONCLUSION

For the foregoing reasons, Respondent, Consolidated Rail Corporation, respectfully submits that the Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973, should be denied.

Respectfully submitted,

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Opposition

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Nos. 81-1967 and 81-1992

In the Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS CANNON, ET AL., PETITIONERS

v.

CONSOLIDATED RAIL CORPORATION AND
UNITED STATES OF AMERICA

UNITED TRANSPORTATION UNION, PETITIONER

v.

CONSOLIDATED RAIL CORPORATION AND
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the authority granted by Congress to the Consolidated Rail Corporation to implement the work force reduction program of Section 702 of the Regional Rail Reorganization Act of 1973, as amended, to be codified at 45 U.S.C. 797a, supersedes existing collective bargaining agreements between the railroad and the United Transportation Union.

2. Whether the work force reduction program authorized by Section 702 violates the Due Process Clause or Just Compensation Clause of the Fifth Amendment to the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-1992

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Special Court, Regional Rail Reorganization Act of 1973 (Pet. App. 5a-30a) is unreported.[1]

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 81-1992.

JURISDICTION

The judgments of the Special Court (Pet. App. 1a; 81-1967 Pet. App. A32-A33) were entered on April 7, 1982. The petition for a writ of certiorari in No. 81-1967 was filed on April 26, 1982, and the petition in No. 81-1992 was filed on April 27, 1982. The jurisdiction of this Court is invoked pursuant to Section 1152(b) of the Northeast Rail Service Act of 1981, 95 Stat. 676.

STATUTORY PROVISION INVOLVED

Section 702 of the Regional Rail Reorganization Act of 1973, as added by Section 1143(a) of the Northeast Rail Service Act of 1981 ("NRSA"), 95 Stat. 662, to be codified at 45 U.S.C. 797a, is set forth in the opinion of the Special Court (Pet. App. 6a-8a n.1).[2]

STATEMENT

1. Section 702 of the amended Regional Rail Reorganization Act of 1973 establishes a work force reduction program that enables respondent Consolidated Rail Corporation ("Conrail") to terminate employment of up to 4,600 train and engine service employees upon the payment of a termination allowance of as much as $25,000, and to "blank" (*i.e.*, refrain from filling) the vacant positions on train crews created by such terminations. An employee's options under the program are to exercise his seniority, if sufficient, to transfer to a job at another location, to accept voluntary furlough, or to accept the statutory termination allowance.

Petitioner United Transportation Union ("UTU"), the union representing train and engine employees of Conrail, filed its suit, Civil Action No. 82-4, in the Special Court on February 4, 1982. UTU sought a declaratory judgment that

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[2]NRSA constitutes Sections 1131-1169 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 643-687.

Conrail may implement the Section 702 work force reduction program only when consistent with existing labor agreements, known as the Fireman Manning Agreement and the Crew Consist Agreement. The latter agreement, negotiated in September 1978, allowed Conrail to reduce certain freight crews from one conductor and two brakemen to one conductor and one brakeman (Pet. App. 11a). Pursuant to that agreement, Conrail could eliminate the second brakeman position only if a trainman with a seniority date prior to the date of the agreement was not available. The Fireman Manning Agreement, dated July 19, 1972, allowed Conrail to eliminate certain firemen (*id.* at 12a). However, firemen with seniority on the date of the agreement could exercise their seniority with respect to any position for which the use of firemen would have been required under the National Diesel Agreement of 1950 as in effect on January 24, 1964 (*ibid.*). The Special Court found that given declining traffic on Conrail, the terms of the two agreements had, prior to 1981, denied Conrail any relief from overmanning (*ibid.*).[3]

Petitioners in No. 81-1967, two firemen and two brakemen employed by Conrail, filed Civil Action No. 82-2, a purported class action on behalf of Conrail firemen and brakemen then working or furloughed, on January 20, 1982. However, petitioners did not file a motion to certify the class and no class was certified. Petitioners alleged that the compulsory separation and blanking provisions of Section 702 violate the Due Process and Just Compensation Clauses of the Fifth Amendment. Plaintiffs also alleged that the $25,000 ceiling on termination allowances and the

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[3]In a separate action, No. 82-7, Conrail sought to enjoin a strike allegedly threatened by the union that was intended to resist implementation of Section 702 as interpreted by Conrail. This suit was consolidated with No. 82-4.

applicability of Section 702 only to Conrail employees denied them the equal protection of the laws guaranteed by the Due Process Clause (Pet. App. 19a).

The Special Court, created pursuant to Section 209 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 719, exercised original and exclusive jurisdiction pursuant to Section 1152(a)(1) and (2) of NRSA, 95 Stat. 676. After the Special Court issued a certificate to the Attorney General pursuant to 28 U.S.C. 2403(a), the United States sought and was granted leave to intervene in Civil Action No. 82-2 to defend the constitutionality of Section 702. The United States also sought and was granted leave to intervene as a defendant in Civil Action No. 82-4 to present its interpretation of Section 702.

2. The Special Court rejected the union's interpretation of Section 702 and upheld the statute so interpreted as constitutional. The court recounted the history of the problem that Section 702 was designed to overcome: the substantial drain on Conrail's resources produced by employment of substantial numbers of firemen and brakemen who were unnecessary to efficient freight service, but who were protected employees under existing collective bargaining agreements (Pet. App. 11a-14a). Based on the language and legislative history of Section 702, the court concluded that Congress intended Section 702 to operate without regard to the Fireman Manning Agreement and the Crew Consist Agreement (Pet. App. 15a-18a). In addition, the court concluded that petitioners' constitutional challenges were unfounded (*id.* at 18a-26a).[4]

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[4]In No. 82-7 (see note 3, *supra*), the court declined to issue an injunction even though the court concluded that it had jurisdiction to do so, accepting instead the representations of union counsel that the union would honor the court's decision.

ARGUMENT

The decision of the Special Court is correct and is consistent with applicable decisions of this Court. The comprehensive opinion written by Judge Friendly, upon which we rely, persuasively answers all of the contentions advanced by petitioners. Further review is not warranted.

1. As the Special Court concluded, Section 702 unequivocally grants Conrail the authority to terminate the employment of certain employees without regard to contrary labor agreements. The introductory sentence of Section 702 states that Conrail "may terminate the employment of certain employees, in accordance with this section." All of the program's procedures are established without reference to, or qualification by, existing collective bargaining agreements.[5]

Despite the clear language of the statute, petitioner UTU maintains that, because Section 702 does not specifically state that it supersedes existing labor agreements, the Special Court's reading cannot stand (Pet. 9-10). This contention is unavailing because, as the petitioners in No. 81-1967 acknowledge (81-1967 Pet. 7 note *), Section 702 would serve no purpose whatsoever if it did not override such agreements. As the Special Court correctly observed, "Conrail required no authorization from Congress to do what existing agreements permitted or to negotiate for changes in them" (Pet. App. 15a).

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[5]As the Special Court noted (Pet. App. 15a), several other sections of the NRSA support Conrail's interpretation of Section 702: Sections 702(e)(3) and (f), which authorize labor and management to enter agreements after the effective date of the statute to govern certain details of implementation of the work force reduction plan; Section 702(e)(4), which explicitly preserves Conrail's prerogatives under existing agreements, but which makes no mention of union prerogatives; and Section 702(g), which makes work force reduction mandatory on commuter lines, rather than simply authorizing Conrail to proceed.

Petitioner UTU also argues (Pet. 10) that the legislative history does "not make any declaration that existing labor agreements are in conflict with and superseded by [Section] 702." This assertion is incorrect. The House Report describes a forerunner to Section 702, contained in the House bill, that was nearly identical to the language enacted, as follows:

> Section 702 permits Conrail to accelerate the implementation of the crew consist and fireman manning agreements so that all excess firemen and all second and third brakemen can be eliminated before the end of calendar year 1982. The firemen on the crews of trains operated in commuter service must be included by the Corporation in the termination program.

H.R. Rep. No. 97-153, 97th Cong., 1st Sess. 30 (1981).

Similarly, the Senate Report describes the predecessor to Section 702 contained in the Senate bill in these terms:

> This section contains a "Special Termination Allowance" allowing Conrail to "blank" the positions (eliminate the job with the man) vacated under the program. Separations would be limited to the numbers of excess firemen and second and third brakemen (including passenger firemen) presently employed by Conrail (but not necessarily the individuals occupying those positions if more senior personnel wish to be separated). About 4600 positions are at issue, and their elimination would make the properties more saleable. This was addressed in the Conrail settlement after the DOT bill was introduced.
>
> *The program would operate at the discretion of Conrail but mandatorily as to affected employees* (after voluntary separations were taken). The section provides for payments at the rate of $200 per month of

> active service with Conrail or a predecessor, with a cap of $25,000 (i.e., 4 years, 2 months service).

S. Rep. No. 97-139, 97th Cong., 1st Sess. 332 (1981) (emphasis added).

Finally, the Conference Committee explained (127 Cong. Rec. S. 9061 (daily ed. July 31, 1981)):

> The purpose of this program is to elimate [*sic*] 4,600 employee positions; 3,300 brakemen and 1,300 firemen. In addition, all the firemen in communter [*sic*] service are to be included in this program. This will result in the elimination of firemen positions in commuter service.

In view of the clarity of the statute and its legislative history, there is no reason to reconsider the Special Court's interpretation of Section 702.

2. The work force reduction program authorized by Section 702 does not violate the Due Process Clause or the Just Compensation Clause of the Fifth Amendment.

In analyzing the due process claims, the Special Court correctly observed that although the collectively bargained manning agreements, as contracts, are in some sense property, they remain subject to the constitutional authority of Congress under the Commerce Clause. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947); *Norman* v. *Baltimore & Ohio R.R.*, 294 U.S. 240, 306 (1935); *Philadelphia, Baltimore, and Washington R.R.* v. *Schubert*, 224 U.S. 603 (1912); *Louisville & Nashville R.R.* v. *Mottley (II)*, 219 U.S. 467, 482 (1911) (Pet. App. 20a-21a). And the Special Court also correctly determined that Section 702 does not constitute a taking for which compensation is constitutionally required. In reaching this conclusion, the

Special Court properly weighed the relevant factors, adduced by this Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (Pet. App. 22a-23a). The Special Court observed that the Section 702 work force reduction program adjusted the benefits and burdens of economic life to promote the common good, rather than effecting a physical invasion of property (*id.* at 22a). Considering the nature and extent of the interference with rights, the Special Court noted that "[Section] 702 by no means abrogates all rights under the pertinent agreements" but offers several options to affected employees (*ibid.*).

The Special Court correctly disposed of the equal protection challenge to the termination allowance ceiling. Citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955), the Special Court concluded that the ceiling has a rational basis, *i.e.*, "[t]he desire to provide a simple, workable maximum on termination allowances." As the court stated (Pet. App. 24a): "Congress was not required to fine tune the maximum separation allowance to the unpredictable merits of each individual case." See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 175-179 (1980); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

The Special Court also correctly rejected petitioners' equal protection challenge based on the fact that Section 702 applies only to Conrail, noting that "[n]o other railroad is similarly situated" (Pet. App. 24a-25a). As this Court explained in *Williamson* v. *Lee Optical Co., supra*, 348 U.S. at 489, the notion of equal protection embodied in the Fifth Amendment does not prevent Congress from addressing one phase of a problem at a time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81—1967

IN THE

Supreme Court of the United States

October Term, 1981

THOMAS CANNON, ROBERT STILLWELL, DONALD R. BREWER and DAVID L. PETERSON, on Behalf of Themselves and all Other Similarly Situated "Firemen" and "Train Service Employees" Affected by the Northeast Rail Service Act of 1981,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION and UNITED STATES OF AMERICA,

Respondents.

Petitioners' Reply to Briefs in Opposition to Petition for Certiorari

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IN THE

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OCTOBER TERM, 1981.

THOMAS CANNON, ROBERT STILLWELL, DONALD R. BREWER and DAVID L. PETERSON, on Behalf of Themselves and all other Similarly Situated "Firemen" and "Train Service Employees" Affected by the Northeast Rail Service Act of 1981,

Petitioners,

against

CONSOLIDATED RAIL CORPORATION and UNITED STATES OF AMERICA,

Respondents.

Petitioners' Reply to Briefs in Opposition to Petition for Certiorari.

POINT I.

The statute challenged differs dramatically from past federal legislation affecting railway labor.

Respondent Conrail implies that Petitioners somehow had no right to rely on their contractual rights simply

because history shows that Congress has frequently legislated in the area of employer-employee relationships in the railroad industry. Conrail Brief at 9. However, recitation of past Congressional regulation of the field by no means refutes Petitioners' contention that §702, due to the way it affects labor agreements, is qualitatively different from all previous railroad legislation.

In no legislation prior to §702 has Congress, after mandating collective bargaining pursuant to 45 U.S.C. §774(d), and subsequent to an agreement's having been struck, moved to nullify specific bargained-for rights on behalf of only one party to an agreement. In fact, the enactment of 45 U.S.C. §774(d) gave Petitioners every reason to expect that their agreement would be honored.

The particularized impact on existing contractual rights of specific groups of individuals sets §702 apart from other broad regulatory measures affecting the railroad industry. This case, contrary to every case cited by the Government, Conrail and the Court below, involves the readjusting of only two contractual relationships and not a generalized regulation. Thus, Petitioners could not have reasonably foreseen the type of superseding of their contractual rights as occurred under §702. See Brief of Conrail at page 9. No party to a contract negotiated under direct congressional mandate can be said to have recognized the likelihood of federal cancellation of the very contract rights thereby created.

The avowed legislative purpose of §702 further sets it apart from previous legislation. The stated intention to secure the profitability of Conrail by reducing labor costs, Pub. L. No. 97-35, §1132(5), constitutes an unprecedented revision of vested contractual rights for the sole purpose

of meeting the "generalized need for funds" of one of the parties to a labor agreement. Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 at 19 (1976).

This case also merits review because, contrary to Conrail's assertion that §702 is directed towards a *sui generis* problem, the principles embodied in §702 are not limited in their application to the railroad industry. An overly broad interpretation of the commerce power is necessary to support the action taken under §702. While it is true that the commerce power is extensive, *Louisville & Nashville R. R. v. Mottley*, 219 U.S. 467, 480 (1911), Conrail seeks to denigrate the equally established principle that other constitutional provisions limit what would otherwise be the unrestrained use of that power. *National League of Cities v. Usery*, 426 U.S. 833. The commerce clause must be read in concert with the Fifth Amendment so that the integrity of both is preserved.

Both Conrail and the Government nevertheless assert that the profitability of Conrail presents unique and difficult problems that justify these impositions on Petitioners. However, similar emergencies could be conjured in other important industries as well, simply by equating the public interest with survivability of a private corporation.

The implications for future collective bargaining in the shadow of possible legislation like §702 render this case of substantial import within as well as without the railroad industry. This is the first opportunity for this court to address this principle; it should be discredited or vindicated now, so that employers, employees and legislators know the extent to which congressional alteration of contract rights will be permitted.

POINT II.

Respondents distort the nature of Petitioners' contract rights.

Conrail grossly mischaracterizes Petitioners' rights to jobs which would be available but for the implementation of §702. Petitioners' rights cannot be only "prospective and contingent," in view of the fact that the Manning and Crew Consist Agreements provide for availability of jobs which are *currently* foreclosed from being filled, while members of Petitioners' class stand ready to fill them. There is no doubt that members of Petitioners' class are not now working when, but for the implementation of §702, they would otherwise be working. Moreover, if Petitioners' rights under these contracts are as ephemeral and valueless as is suggested by Conrail and the Government, one wonders why elimination of such contractual rights is so essential to the preservation of the financial stability of Conrail.

It is virtually certain that normal attrition rates would, in the absence of §702, cause jobs to become available continuously for both firemen and train service employees. This natural attrition clearly was accelerated by the buyout portion of the §702 program. Those persons who were ready and who would be ready in the near future to retire or step down from their jobs are removed under the §702 system. Instead of normal attrition with subsequent availability of jobs based on seniority, each buyout under §702 is followed by the "blanking" of a job which Petitioners are then prevented from filling. Under this buyout program, the system is divested of all persons available for normal attrition. Since normal attrition was a virtual certainty, and since the Manning and Crew Consist

Agreements would have provided guaranteed access to the jobs thereby vacated, §702 was enacted for the avowed purpose of quashing Petitioners' "concrete" right to these jobs.

It was clear from the initial legislative discussions of §702 how and by how much the labor force would be reduced. It defies logic and justice, when this impact was so clearly designed and foreseen, to suggest that those directly affected have lost nothing more than an "expectancy."

In *United States v. Willow River Power Co.*, 324 U.S. 499, this court set the standard for determining when property interests are subject to Fifth Amendment protection. Such protection accrues so long as the right is in the nature of an economic interest, which the contractual right to a job clearly is, and so long as the right is legally enforceable. 324 U.S. at 503. Since, in the absence of §702, Petitioners' rights under the Manning and Crew Consist Agreements could be protected under the Railway Labor Act, 45 U.S.C. §151 *et seq.*, the enforceability portion of the test is also clearly met.

POINT III.

Respondents' arguments are a Machiavellian subversion of Fifth Amendment protections.

The arguments of Conrail and the Government that §702 is within the regulatory power of Congress ignores the difference between a general regulation and a condemnation of specific property rights. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384. While the difference between the two may often blur, *Penn Central*

Transportation Co. v. New York City, 438 U.S. 104, the direct nature of the taking there could hardly be more apparent. The Government and Conrail attempt to justify this taking on the theory that it is in the public interest. This is merely an assertion that the end justifies the means; that because the public will benefit from improved rail service in the Northeast, Petitioners' rights may be appropriated without compensation. This justification is clearly contrary to law. Even in times of national emergency, or even in war, this Court has recognized that property rights may not be appropriated for the public benefit without compensation. *United States v. General Motors Corp.*, 323 U.S. 373.

Finally, it should be noted that Respondents' assertion that there was no practical alternative to §702 is a bootstrap argument. The theory is posed that the profitability deadline set by the Congress was in danger of going unmet and that, therefore, there was a necessity for drastic action. However, even regardless of indications of Conrail's profitability prior to §702, the fact is that it was Congress that set the deadline. It is illogical if not perverse to suggest that Congress could create the very emergency required to justify the appropriation of Petitioners' contract rights. Moreover, equally blind to the facts is Conrail's contention that normal procedures of collective bargaining would have been ineffective to produce the concessions necesary to assure the continued profitability of Conrail. While it is true that negotiations under the Railway Labor Act often are protracted, *Detroit and Toledo Shoreline R.R. v. United Transportation Union*, 396 U.S. 142, 149, uncompensated divestment of contractural rights should not be based on the shallow assumption that the specter of piecemeal sale of Conrail would not have produced expedited negotiations and concessions.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Petition, certiorari should be granted.

June, 1982

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